TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1279.

THE CENTRAL TRUST COMPANY OF NEW YORK, APPELLANT,

vs.

R. S. GRANT.

No. 1280.

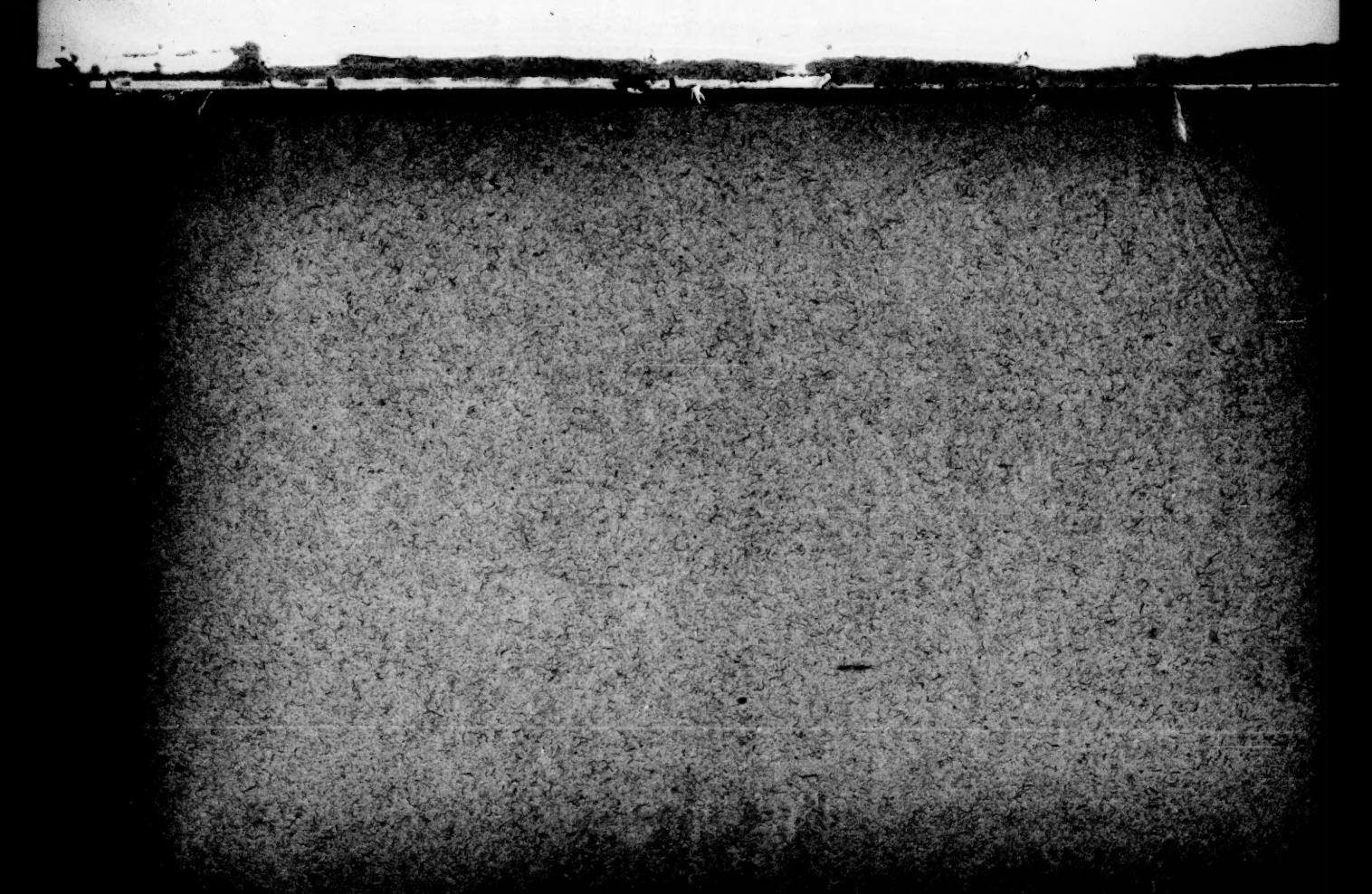
THE DAYTON, FORT WAYNE AND CHICAGO RAILROAD COMPANY, APPELLANT,

vs.

R. S. GRANT.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED OCTOBER 2, 1889.



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(Record, p. 1 to 18, incl.)

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of October, being also the second day of that month, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and thirteenth—present, the Hon. Howell E. Jackson, circuit judge, and the Hon. George R. Sage, district judge—among the proceedings had were the following, to wit:

THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, &c., Complainant,
against
THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD COMPANY *et al.*, Defendants.
} # 3554. In Chancery.

Be it remembered that heretofore, to wit, on the 14th day of August, in the year of our Lord one thousand eight hundred and eighty-three, came the complainant, by counsel, and filed in the clerk's office of said court its certain bill of complaint, clothed in the words and figures following, to wit:

Bill of Complaint.

Circuit Court of the United States, Sixth Circuit and Southern District of Ohio, Western Division.

THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation,
vs.
THE TOLEDO, CINCINNATI AND ST. LOUIS Railroad Co., The Cincinnati Northern Railway Company, The Spring Grove, Avondale and Cincinnati Railway Company, and Grenville D. Braman.
} No. 3554. In Chancery.

Bill in equity.

To the judges of the circuit court of the United States for the southern district of Ohio:

The Central Trust Company of New York, a corporation under the laws of the State of New York and a citizen thereof, brings this its bill of complaint against the Toledo, Cincinnati and St. Louis Railroad Company, claiming to be a corporation under the laws of Ohio, and the Cincinnati Northern Railway Co., a corporation under the laws of Ohio, and the Spring Grove, Avondale and Cincinnati Railway Co., a corporation of Ohio, and Granville D. Bra-

man, a citizen of the State of Massachusetts, and your orator complains and says—

That on the first day of October, A. D. 1880, the Cincinnati Northern Railway Company, a corporation under the laws of Ohio, being then engaged in the construction and equipment of a certain railroad and appurtenances from the city of Cincinnati, in the county of Hamilton and State of Ohio, northwardly in and through the counties of Hamilton, Butler, and Warren, in said State, to the village of Waynesville, in said county of Warren, did, by its president and secretary, under its corporate seal and in pursuance of a resolution to that end adopted by the board of directors of said corporation on the 16th day of August, 1880, which was subsequently and before the execution of the bonds and of the indenture hereinafter mentioned duly ratified by all the stockholders of said corporation, execute one thousand of its bonds for the sum of one thousand dollars, each dated the said 1st day of Oct., A. D. 1880, payable on the first day of October, A. D. 1920, said bonds bearing six per cent. interest per annum, payable semi-annually on the 1st days of April and October in each and every year at the city of New York, each having interest warrants for thirty dollars each thereto attached for payment of the interest as aforesaid; and said Cincinnati Northern Railway Company issued and sold one thousand of said bonds, with said interest warrants attached, which are now in the hands of divers and sundry persons as holders thereof; and with the proceeds of sale of said bonds the said corporation constructed and equipped said railway.

And your orator further represents that in order to secure said bonds and the payment of the said interest as the same should mature the said Cincinnati Northern Railroad Company did on said day, in pursuance of the further provision of said resolution, execute and deliver unto your orator a certain deed or indenture, whereof a true copy is hereto attached, marked Exhibit A, and thus made a part of this bill, which indenture was duly recorded on the 17th day of November, A. D. 1880, in the several counties in and through which said railway extended, whereby it did grant, bargain, sell, and convey in fee simple unto your orator, its successors and assigns, all and singular the aforesaid railroad known as the Cincinnati Northern railway, from Cincinnati, in Hamilton county, Ohio, to Waynesville, in Warren county, Ohio, and passing through and into the counties of Hamilton, Butler, and Warren, in the State of Ohio, about forty-two miles in length, constructed and to be constructed, together with all the real and personal property of said company connected with said railroad and its incomes derived therefrom, and its lands, tenements, and hereditaments, rights of way and branches, side tracks, rails, ties, locomotives, tenders, engines, cars, carriages, equipment, rolling stock, machinery, tools, implements, material, chattels, franchises, and privileges, rights, interests, income, rents, reservations, resources, benefits, investments, assets, and estates, legal and equitable, which were then owned or should thereafter be owned or acquired by said company as part of or in connection with the said railroad or in any way appertaining or belong-

ing to said railroad, and also all the personalty and movable property of the said Cincinnati Northern Railway Company, including all its locomotives, engines, tenders, cars, carriages, equipment, rolling stock, machinery, tools, implements, material, chattels of every kind and character, wherever used or situated, whether upon the line of said company's railroad or elsewhere, then owned or thereafter to be acquired by said company; to have and to hold the above-mentioned property and assets thereby conveyed or intended to be conveyed, with all and singular the reversions, remainders, issues, privileges, and appurtenances then or thereafter belonging or in anywise appertaining thereto, unto your orator and to its successors and assigns forever, in trust, nevertheless, for the persons and corporations and for the benefit, security, and protection of the persons, firms, and corporations who should hold the bonds and interest warrants aforesaid or any or either of them for enforcing the payment thereof when payable, in accordance with the true intent and meaning of the stipulations of said deed of trust or mortgage and of said bonds and of said interest warrants.

And your orator further states that in and by said mortgage or deed of trust to your orator it was provided and the said Cincinnati Northern Railway Co. did therein covenant and agree that if any default should be made in the payment when due of any interest upon any of said bonds and such interest should remain unpaid and in arrear for the space of three months, or in case of default made in the payment of the principal of any of said bonds, then the said Cincinnati Northern Railway Company should, upon demand of your orator or the trustees of said trust deed for the time being, forthwith surrender to your orator or such trustees or their agent or agents the actual possession of all and singular the property, assets, and estate conveyed or intended to be conveyed in said indenture; to hold, use, manage, and receive the rents, issues, and income and profits thereof for the benefit of the holders of said bonds, making from time to time all needful repairs and alterations and additions and paying all proper costs, charges, and expenses of so taking, holding, and managing the same, including a reasonable compensation to said trustee or trustees from the income thereof, and applying the residue to the payment *pro rata* to and among the parties entitled thereto of the overdue interest on said bonds, with interest thereon and the interest accruing during such possession; but such possession was not to be taken unless your orator or such other trustee should be thereto requested in writing by the holders of at least one-third in amount of said bonds.

And your orator further represents that it was also provided in said mortgage or deed of trust that if any default should be made in the payment when due of interest on any of said bonds when as it might accrue, then upon the happening of any such default your orator or any successor to it in the trusts of said deed might take proper legal proceedings to enforce the rights of the holders of said bonds upon being thereto requested in writing by the holders of one-third in amount of the bonds aforesaid; and that the proceeds arising from any sale made in pursuance thereof should be applied,

first, to pay your orator or such other trustee all reasonable costs, charges, and expenses and to indemnify it or them against all liability in the premises; second, to pay the holders of said bonds, in full or in equal proportion, the principal and interest of said bonds then outstanding without priority in lien of interest over principal or of one bond over another; third, the surplus, if any, remaining after the payment in full of all said bonds, principal and interest, including the interest on overdue interest, should be paid to your orator, its successors and assigns.

And your orator further represents that it was provided in said mortgage or deed of trust that upon a sale of said premises and property by virtue of the judgment and decree of any court of competent jurisdiction, rendered in any suit or proceeding for the enforcement or foreclosure of the lien of said trust deed or mortgage, the principal of all the aforesaid bonds should become and be immediately due and payable.

And it was further provided therein that upon payment in full of the interest and principal of said bonds said deed of trust or mortgage should be null, void, and of no effect.

And your orator further represents that the said Cincinnati Northern Railway Company has failed to pay the interest on said bonds and has made default therein to all the holders thereof, and, among others, to Charles Rice, a holder of eleven of said bonds, to whom, as well as to all the holders of said bonds and coupons, said company has failed to pay the interest warrants or coupons due thereon October 1st, A. D. 1882, and April 1st, A. D. 1883, and the same have ever since remained unpaid, although payment of the *sum* was duly demanded at the city of New York; and the holders of one-third in amount of said bonds to whom such default has been made have served upon your orator a written demand, requiring your orator to institute the necessary legal proceedings to foreclose said mortgage and sell the said railway and property of the Cincinnati Northern Railway Company and for the appointment of a receiver of said property separately, and to take such other and further steps necessary and proper for the protection of the rights of the holders of said bonds as your orator may be authorized to take by said deed of trust or mortgage.

And your orator deems it for the interest of the parties concerned, particularly of the holders of the said first-mortgage bonds and coupons, to institute judicial proceedings for the foreclosure of said mortgage or deed of trust and for the sale of all the premises and property thereby conveyed and for the appointment of a separate receiver to take possession of, operate, and control the said railroad and its branches and leased lines and to take an inventory of all the personal or movable property included in said mortgage and to keep an account of the earnings and of the expenses incurred in operating said railway and its leased lines.

And your orator further says that on and prior to the 25th day of April, A. D. 1881, the Spring Grove, Avondale and Cincinnati Railway Co. was a corporation duly organized under the laws of Ohio, engaged in locating, constructing, and equipping a line of railway from

a point in the city of Cincinnati, Hamilton county, Ohio, south of Court street and west of Broadway to Spring Grove cemetery, in said county, and part of said road had at that time been constructed and was ready for use, and thereafter, on or about said last-named day, said Cincinnati Northern Railway Company had leased for a term of ninety-nine years, renewable forever, the tracks, road-bed, rights of way, property, privileges, and franchises then owned or thereafter to be acquired by the said Spring Grove, Avondale & Cincinnati Railway Co., with the privilege of purchasing the same at any time after three years for the sum of five thousand dollars, and in consideration of the said lease the said Cincinnati Northern Railway Company, among other things, agreed to and did execute and deliver to your orator on the 25th day of May, 1881, its certain deed of trust by way of mortgage, a true copy whereof is filed with this bill as Exhibit "B," whereby it conveyed to your orator, as such trustee, all its property, rights, and franchises whatsoever then owned or thereafter to be acquired by it to secure the payment as the same might mature of the principal and interest of one million dollars of mortgage bonds theretofore issued by the said Spring Grove, Avondale and Cincinnati Railway Company secured on its said road, payable July 1, 1921, with interest warrants thereto attached for the payment of interest thereon at the rate of six per cent. per annum, payable semi-annually on the first days of January and July of each and every year.

And it was therein and by said last-named deed of trust or mortgage agreed by and between your orator and the said Cincinnati Northern Railway Co. that the lien of said mortgage should be second only to the lien of the deed of trust or mortgage upon the same property, right, and privileges hereinbefore first set forth.

And your orator further says that the interest on said bonds has not been paid, but that both the said Spring Grove, Avondale and Cincinnati Railway Co. and the said Cincinnati Northern Railway Co. have failed to pay the same and have made default therein to all holders of said bonds to whom said companies have failed to pay the interest warrants or coupons thereon due the first day of January, 1883, and the first day of July, 1883, and the same have never been paid.

And your orator represents further that the foregoing mortgage was duly recorded in the proper counties, and that the same is a good lien or incumbrance upon all the premises and property hereinbefore described and mentioned of the said Cincinnati Northern R'y Co.

And your orator further represents that the said Cincinnati Northern Railway Company, proper corporate action for that purpose having first been had, did, on the 25th day of May, A. D. 1881, deliver to your orator as trustee a certain other indenture (a true copy whereof is herewith filed as Exhibit "C"), whereby it granted, bargained, sold, and conveyed unto your orator as trustee all the railroad, property, rights, franchises, goods, and chattels described or mentioned in the mortgage first set forth in this bill, then owned and thereafter to be acquired, to secure the payment at ma-

turity of the principal of one thousand bonds of the said Cincinnati Northern Railway Co., known as income bonds, for one thousand dollars each, numbered consecutively from 1 to 1000, inclusive, payable on the 1st day of April, 1921, and of such interest upon the said bonds as by the terms of said bonds and of said indenture might be due and payable.

And your orator further says that it was by said indenture last mentioned expressly agreed that the interest upon said bonds was not to accrue or to be payable except out of net earnings of said Cincinnati Northern railway applicable to that purpose, and when the amount thereof should be ascertained and declared by said board of directors of said last-named company, whose duty it was by the terms of said indenture in each year, 1882, in the month of January, to declare what amount, if any, of net earnings had been made during the preceding year which was justly applicable to the payment of interest on said income bonds, and such ascertainment of net earnings was to be made by deducting from gross earnings all operating expenses, including rebates, taxes, insurance, rent, interest on floating debt and borrowed money, and payment made on principal thereof, and liabilities for interest on the said first-mortgage bonds of the said railway company.

And your orator further says that said mortgage was duly recorded in each of the various counties in and through which the said railway extended.

And your orator further represents, on information and belief, that one thousand of the said bonds so secured as aforesaid by said indenture have been issued and disposed of by said Cincinnati Northern Railway Co. and are now in the hands of divers and sundry persons as owners thereof unknown to your orator.

And your orator further represents that no interest has become or is now due or payable on said bond under the terms thereof and of said indenture, owing to insufficiency of earnings, but that the principal of said bonds issued as aforesaid is a lien upon said property, rights, franchises, etc., of said Cincinnati Northern Railway Co. next after the mortgage hereinbefore secondly described.

And your orator further says that on the 5th day of May, A. D. 1883, a certain corporation by the name of the Toledo, Cincinnati and St. Louis R'y Co., claiming to be a corporation of the States of Ohio, Indiana, and Illinois by virtue of certain consolidations and claiming to have power to construct, maintain, and operate a railroad from the city of Toledo, in the State of Ohio, to the town of Delphos, in said State, and thence through the States of Indiana and Illinois into the city of East St. Louis, in said last-named State, and from the said town of Delphos to a connection with the said railroad of the Cincinnati Northern Railway Co. at or near Dodds, in the county of Warren, in the State of Ohio, entered into an agreement with the said Cincinnati Northern Railway Company and the said Spring Grove, Avondale and Cincinnati Railway Company, corporations as aforesaid, whereby said three corporations undertook under the name of the Toledo, Cincinnati and St. Louis R. R. Co. to consolidate and unite the said lines of railroad at their said

respective points of connection and to consolidate the capital stock of the said respective companies under the laws of Ohio, and to transfer and vest in said consolidated company, to wit, The Toledo, Cincinnati and St. Louis Railroad Company, defendant in this bill of complaint, all the powers, privileges, immunities, and property, real, personal, and mixed, belonging to the respective companies, parties to said agreement of consolidation, said consolidated company expressly recognizing and affirming the said several mortgages hereinbefore mentioned and the said bonds and coupons secured thereby and assuming payment of same, the capital stock of said consolidated company to be thirty millions of dollars, of which eleven millions was to be preferred stock and the balance thereof to be common stock. A true copy of said agreement of consolidation is filed herewith as Exhibit D, to which reference is made as part of this bill.

And your orator further represents that it is informed and believes that said agreement of consolidation was acted under by said companies from said date, although your orator says neither it nor any holder of said bonds or coupons was party to said consolidation or has assented thereto or acquiesced therein.

And your orator further says that it is claimed by the said consolidated company, the said Toledo, Cincinnati, and St. Louis Railroad Company, that it owns, by virtue of said consolidation, all the aforesaid property, real, personal, and mixed, rights, franchises, and assets and credits of the said Cincinnati Northern Railway Co. and of the said Spring Grove, Avondale & Cincinnati R'y Co., and that the same have become subject to the debts and liabilities of the said consolidated company; but your orator says that whatever rights, if any, in or to the same the said Toledo, Cincinnati and St. Louis Railroad Co. acquired by virtue of said consolidation, the same are subject and subordinate to all the mortgages hereinbefore stated, and that the railroad, property, franchises, rights, and assets of the said Cincinnati Northern Railway Company are not nor were they at the time of said consolidation more than sufficient to pay its said first-mortgage bonds and interest secured thereon by said first mortgage, and are of much less value than the amount of all the bonds and interest secured thereon by the several mortgages hereinbefore mentioned.

But your orator says that the net earnings of the said Cincinnati Northern railway and of the said Spring Grove, Avondale and Cincinnati Railway Co. are sufficient, as it believes, if kept separate, to pay the interest warrants or coupons of said first-mortgage bonds of said Cincinnati Northern Railway Co.; but that the said Toledo, Cincinnati and St. Louis Railroad Company claims that the earnings of the said Cincinnati Northern Railway Company and its said leased line should go into the common fund of said consolidated company, and that no account should be kept of the separate earnings and expenses thereof; and the earnings and income of the said Cincinnati Northern Railway Company and its said leased line are now and ever since said consolidation have been received and taken by said consolidated company, the said Toledo, Cincinnati

and St. Louis Railroad Co., which is hopelessly insolvent, and appropriated to pay the expenses of said consolidated company and wholly diverted from the payment of the interest or any part thereof due upon the said bonds of the said Cincinnati Northern Railway Company.

And your orator further says that unless such separate account of the earnings and expenses of said Cincinnati Northern Railway Co. be carefully kept and preserved it will be impossible to ascertain whether any interest shall have become due or payable upon the income bonds hereinbefore described.

Wherefore and forasmuch as your orator is without remedy at law your orator brings this its bill of complaint in equity in behalf of all the holders of bonds and coupons secured by said mortgage herein first mentioned and prays that Granville D. Braman, who claims some interest, and the said Cincinnati Northern R'y Co. and the said Spring Grove, Avondale and Cincinnati Railway Co. be made def'ts hereto and the said consolidated Co., the Toledo, Cinn. & St. L. Co., may be made to answer as to its interest; that process of subpœna may issue against each of them, and that they be required to make answer, respectively, to all and singular the allegations and charges hereto upon such terms and conditions as this honorable court may deem most to the interest of the holders of said first-mortgage bonds and coupons, and that out of the proceeds of such sale the amount of bonds and interest secured by said first mortgage or deed of trust to your orator may be paid to your orator for the holders thereof, respectively, and that the balance, if any, of said proceeds of sale may be paid to your orator as trustee for the holders of said bonds and coupons secured by said second and third mortgages on said Cincinnati Northern railway in the order of priority, and that meanwhile and until such sale a receiver other than the receiver heretofore appointed for the said consolidated company may be appointed of all and singular the premises and property aforesaid embraced within the said mortgage or deed of trust hereinbefore first set forth, and that he be authorized and empowered to maintain and operate said railway of the said Cincinnati Northern R'y Co., including said Spring Grove, Avondale and Cincinnati railway, and to exercise all the powers usually granted to receivers, and to receive and collect all rents and other income from any of said mortgaged property, and to preserve the same and all parts of the said mortgaged premises and property from waste and loss, and to pay the rent on leased premises, and to carry out such contracts and agreements of said Cincinnati Northern Railway Co. as may be to the interest of the said several parties therein interested, and for such other and further relief as in equity and good conscience your orator may be entitled to.

HOADLY, JOHNSON AND COLSTON,
Counsel for the Central Trust Co. of New York.

UNITED STATES OF AMERICA,
State of Ohio, Hamilton County, } ss:

Edward Colston, being duly sworn, says he is agent and solicitor for The Central Trust Co. of New York, complainant in above bill and that the facts therein stated on information or belief are true as he believes.

EDWARD COLSTON.

Sworn to before me and subscribed in my presence this 11th day of August, 1883.

JOHN FLACK WINSLOW,
Notary Public, Hamilton County, Ohio. [SEAL.]

(Record, p. 9 to 22, incl.)

And afterwards, to wit, on the 20th day of October, A. D. 1883, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal V, p. 162.

This cause came on to be heard upon the bill of complaint and upon the respective pleas of the Toledo, Cincinnati and St. Louis Railroad Co. and of Granville D. Braman filed in this cause on the 17th day of September, A. D. 1883.

Upon consideration whereof it is ordered, adjudged, and decreed that each of said pleas is insufficient in law and each of the same is overruled and each of said defendants is given leave to answer to said bill of complaint.

And said cause coming on further to be heard upon the motion of the said The Central Trust Co. of New York for the appointment of a receiver of all and singular the premises and property and assets, real and personal, of the said Cincinnati Northern Railway Co. (and of its said leased line described in said bill of complaint as the Spring Grove, Avondale and Cincinnati railway) owned by said Cincinnati Northern Railway Co. at the time of its consolidation with the said Toledo, Cincinnati & St. Louis Railroad Co., as averred in said bill of complaint of the said Central Trust Co. of New York; upon consideration whereof it is now, by Hon. John Baxter, judge of said circuit court, ordered, adjudged, and decreed that William J. Craig be, and he hereby is, appointed receiver herein of all and singular the premises, property, money, and assets owned by the said Cincinnati Northern Railway Co. (including said leased line) or to which it was entitled at the time of its said consolidation with said Toledo, Cincinnati and St. Louis Railroad Co., upon giving bond, with security, to be approved by the Hon. John Baxter, circuit judge, or by the Hon. George R. Sage, sitting in the circuit court in said district, in the penal sum of ten thousand dollars, conditioned for the faithful performance of his duties as such receiver and for obeying all the lawful orders of the court herein, and that, as such receiver, he is hereby ordered and directed to take possession of, maintain, and operate the said railroad and premises

described in the said bill of complaint, being the railroad of the Cincinnati Northern Railway Co., extending from Cincinnati, in Hamilton county, Ohio, to Waynesville, in Warren county, Ohio, and passing through and into the counties of Hamilton, Butler, and Warren, in said State of Ohio, being about forty-two miles in length, constructed and to be constructed.

Also to take possession of, maintain, and operate as the property of said Cincinnati Northern Railway Co. *and* the said leased line described in said bill and known as the Spring Grove, Avondale and Cincinnati railway, extending from a point in the city of Cincinnati, in said Hamilton county, Ohio, south of Court street and west of Broadway, in said city, through the counties of Hamilton and Butler, in said State of Ohio, to the town of Venice, in said Butler county, and to take possession of all the property, real and personal, owned by the said Cincinnati Northern Railway Co. or to which it was entitled at the date of its consolidation with the said Toledo, Cincinnati and St. Louis Railroad Co. and the equipment, income, franchises, and appurtenances thereof, as well as lands and other premises and property, belonging to said Cincinnati Northern Railway Co. at said time, as fully described in said bill of complaint, reference whereto, for greater certainty, is had and made.

And said receiver is hereby clothed with all the authority and rights usually given to a receiver by courts of equity to take charge of, care for, and operate said railroad, including said leased line; to make reports of his acts and doings to this court at least every two months or oftener if required by the court; to collect and receive the tolls, incomes, issues, rents, and profits of said premises, and out of the same to make such repairs as may be necessary to preserve and keep the same in a safe and proper condition; and said receiver is hereby authorized to operate said railroad, including said leased line, in connection with any other or others of the constituent roads of the said Toledo, Cincinnati and St. Louis railroad of which he may be appointed receiver, but is hereby directed to keep the accounts of the earnings and expenditures of any of the other of the constituent roads of the said Toledo, Cincinnati and St. Louis Railroad Company of which he may be appointed receiver, but is hereby directed to keep the accounts of the earnings and expenditures of the said Cincinnati Northern Railway Co. separate from the earnings and expenditures of any of the other of the constituent roads of the said Toledo, Cincinnati & St. Louis Railroad Co., except the said Spring Grove, Avondale, & Cincinnati Railway Co.

And the said defendants, The Cincinnati Northern Railway Co. and The Toledo, Cincinnati & St. Louis Railroad Co., are hereby ordered and directed to deliver to the said William J. Craig, receiver, possession and control of all the property, rights, and privileges of every kind belonging to the said Cincinnati Northern Railway Co. and to the said Spring Grove, Avondale and Cincinnati Railway Co. at the time of the consolidation of said respective companies with the said The Toledo, Cincinnati & St. Louis Railroad Co.

And it is further ordered that said receiver make and file in

this court a true inventory of all the cars, engines, rolling stock, material, or supplies belonging to or in possession of said Cincinnati Northern Railway Co. at the time of its said consolidation, as well as of all property coming into his possession by virtue of this order.

And said receiver is further ordered to keep the accounts of all through freight and passenger business over said constituent roads so that the receipts therefrom may be duly apportioned between the same, as the court may hereafter direct.

To the judgment of the court overruling the said pleas of said Braman and of said T., C. & St. L. railroad the said Braman and said Toledo, Cincinnati and St. Louis Railroad Company except, and also except to the order of the court appointing a receiver.

(Record, p. 23.)

And afterwards, to wit, on the 27th day of October, A. D. 1883, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal, V. 179.

This day came the said petitioner, R. S. Grant, by Bluford Wilson, his solicitor, and on motion to the court it is ordered that the said petitioner have leave to intervene in this cause and file his petition herein.

(Record, p. 24 to p. 29, incl.)

And afterwards, to wit, on the 27th day of October, A. D. 1883, the following intervening petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Intervening Petition.

UNITED STATES OF AMERICA, *Southern District of Ohio*, } ss:

In the United States Circuit Court for the Southern District of Ohio.

THE CENTRAL TRUST CO. OF NEW YORK, a Corporation, *against* GEORGE D. BRAMAN and THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY, *et al.* } In Equity.

To the honorable the judges of said court:

Respectfully shows to your honors R. S. Grant, of the city and State of New York, that heretofore, to wit, on or about March 24, 1883, your petitioner entered into a certain agreement with the Cincinnati Northern Railway Co., a corporation established under the laws of Ohio, for the lease of ten locomotives and tenders marked and numbered as follows, viz., 67 to 76, inclusive, made by the Grant Locomotive Works of Paterson, in the State of New Jersey, which said agreement is hereto annexed and made part hereof.

That subsequently, on or about April 1st, 1883, said Cincinnati Northern Railway Co. became consolidated with and merged into the said Toledo, Cincinnati and St. Louis railroad, a corporation established under the laws of the States of Ohio, Indiana, and Illinois. By the terms of said consolidation said consolidated railroad company assumed and became responsible for the obligations and covenants of said agreement.

And your petitioner further shows that under said agreement of lease he delivered to said Cincinnati Northern Railway Co. the ten locomotives and tenders described in said agreement and received in *case* from said railway company the sum of $18,558.97 as an installment of rent, and also on each tenth day of May, June, and July, 1883, the further sums of $1,500, monthly rental, as provided for in said agreement.

And your petitioner further shows that he has kept and performed all the covenants and obligations in said agreement named on his part to be kept and performed, but said consolidated railroad company failed so to do and has made default in the payment of the $1,500 monthly rental that was due and payable to your petitioner August 10th, Sept. 10, and October 10, 1883, respectively, and has also made default in the payment of the half-yearly interest due under said agreement on the first day of October, 1883, amounting to $2,160.00.

And said consolidated railroad company still neglects and refuses to make the said payments, although requested so to do.

And your petitioner further shows that heretofore, to wit, on the 1st day of August, 1883, said Toledo, Cincinnati and St. Louis Railroad Company being insolvent and unable to meet its current obligations, E. E. Dwight, Esq., was duly appointed receiver thereof and said Dwight accepted said trust; and afterwards, under the order of this court, W. J. Craig, Esq., succeeded to said trust as receiver herein.

All of which appears by the original proceedings in said cause in this honorable court, and said receiver entered into possession of said railroad and has seized and now retains possession of said ten locomotives and tenders and refuses to surrender the same to your petitioners.

And your petitioner further shows that under said agreement, by reason of said default, your petitioner is entitled to the immediate possession of said ten locomotives and tenders, and, further, that the principal of the $72,000 six per cent. equipment trust bonds, known as series "F" and mentioned in said agreement, is now due and payable, with the half-yearly interest above mentioned, and your petitioner is the sole owner and holder of said bonds.

And your petitioner further shows that the said locomotives and tenders have become greatly deteriorated in value by use on said railroad while in the possession of said receiver, so that, as he is informed and believes, it will require an outlay of at least $10,000.00 to put them in fair marketable condition, for which sum, under the terms of said agreement, your petitioner is entitled to reimbursement.

Your petitioner further shows that there is a balance due him on account on the original payment of rental amounting to $638.33, and that the entire amount due to your petitioner on the 20th day of October, 1883, for monthly rentals, $4,000.00; half-yearly interest, $2,160.00; repairs, $10,000.00, and balance, $638.33, will be the sum of $16,789.33, all of which your petitioners claim is fairly and equitably due from the said receiver and should be paid by him.

Wherefore your petitioner prays that the said receiver may be ordered to pay to your petitioner the said sum of $16,798.33 out of any moneys in his hands, and that for the better securing of the payment of the same said sum may be adjudged by your honors to be a charge upon all the property of said consolidated railroad, and especially upon all the property of said Cincinnati Northern Railway Co., as ahead of the first-mortgage bonds secured by the pledge of said property, and upon the proceeds arising from the sequestration of the same in this cause or any similar proceedings that may be instituted for that purpose.

And your petitioner further prays that the said receiver may be ordered to forthwith surrender said ten locomotives and tenders, and, further, to pay to your petitioner whatever amount may be found to be due after the sale by him of said locomotives and tenders and the application of the process to the payment of said $72,000 and the interest of said equipment bonds in accordance with the terms of said agreement; and that said amount or balance so found to be due may be adjudged like priority over the said first-mortgage bonds as above prayed for in the matter of rental, interest, and repairs.

And for such other and further relief as to your honors may seem meet.

And your petitioners shall ever pray.

WILSON AND JONES,
Solicitors for Petitioner.

UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, } *ss:*

Bluford Wilson, being duly sworn, says that he is one of the solicitors for the petitioners in the above cause and is familiar with the matters and things stated in said petition, and that the same are true except where stated on information and belief, and those he believes to be true.

BLUFORD WILSON.

Sworn to before me and subscribed in my presence this 27th day of October, A. D. 1883.

ROB'T C. GEORGI,
Dep. Cl'k, U. S. C. C., S. D. O. [SEAL.]

* * * * * * *

(Record, p. 591 to p. 604, incl.)

SCHEDULE A.

I.

This agreement, made and entered into this twenty-fourth day of March, A. D. 1883, by and between R. Suydam Grant, of New York, party of the first part (hereinafter called the lessor), and the Cincinnati Northern Railroad Company, a corporation duly established under the laws of the State of Ohio, party of the second part (hereinafter called the lessee), witnesseth:

That the said lessor this day agrees to lease and does hereby lease, upon the terms hereinafter set forth, to the said lessee the following railroad equipment and rolling stock, viz:

Ten locomotive engines and tenders, marked and numbered as follows, viz., 67 to 76, inclusive, made by the Grant Locomotive Works of Paterson, in the State of New Jersey, with the privilege of using the same at the said lessee's own risk for the term of five years from the first day of May, 1883, at the expiration of which term the said lessee shall and will deliver up and return the same to the said lessor in the city of Cincinnati, State of Ohio, in their present good order and condition, reasonable wear and tear alone excepted, and without excuse for non-delivery because of unavoidable accidents, unless purchased by the said lessee from the said lessor within the time and in the manner hereinafter specified.

That the said lessee has heretofore paid in cash the sum of eighteen thousand five hundred and fifty-eight dollars and ninety-seven cents as an installment of the rental for said rolling stock, the receipt of which is hereby acknowledged, and hereby agrees to pay to the said lessor, at the office of the American Loan and Trust Company, in the city of Boston, the following sums, viz: On the tenth of each month in the first and second years of the term of this lease, beginning with May 10th, 1883, the sum of fifteen hundred dollars; on the tenth day of each month in the third and fourth years of the term of this lease, beginning with May 10th, 1885, the sum of fourteen hundred dollars; on the tenth day of each month in the fifth year of the term of this lease, beginning with May 10th, 1887, the sum of thirteen hundred dollars, the final payment to be made April 10th, 1888, being the balance of the amount to be paid to the said lessor as rental for the said rolling stock and the half-yearly interest at the rate of six per cent. per annum on the total amount of the said rental remaining unpaid, and also to pay all taxes that may at any time be levied or assessed upon said railroad equipment and rolling stock and all premiums for insurance that may be paid by the said lessor under the provisions of this agreement.

The said lessee further promises and agrees to execute and deliver to said lessor seventy-two coupon equipment bonds, dated the 1st day of May, 1883, each for the sum of one thousand dollars, thirteen of which mature May 1st, 1884; fifteen of which mature May 1st, 1885; fourteen of which mature May 1st, 1886; fifteen of which

mature May 1st, 1887; fifteen of which mature May 1st, 1888, representing the rental to be paid by the said lessee as aforesaid, and having coupons attached, representing interest upon said rental from the date of this lease to date of payment of said bonds.

The said bonds and coupons shall be substantially in the form following, respectively, to wit:

UNITED STATES OF AMERICA, *State of Ohio.*

The Cincinnati Northern Railway Company Six per Cent. Equipment Trust Bond.

No. —. Series F. $1,000.

For value received, the Cincinnati Northern Railway Company promises to pay to the bearer at the office of the American Loan and Trust Company, in the city of Boston, one thousand dollars on the first day of May, A. D. 188–, and on presentation and surrender of the annexed coupons, as they shall severally become due, to pay interest thereon at the rate of six per cent. per annum from the first day of May, 1883, until payment or redemption of this bond.

This bond is one of a series of seventy-two bonds of like amount and import, but maturing at different dates on or before May 1st, 1888, known as the Cincinnati Northern Railway Company's equipment trust bonds, series F, which, with the coupons thereto attached, represent the rental for a term of five years of ten locomotive engines and tenders made by the Grant Locomotive Works of Paterson, New Jersey, and numbered 67 to 76, inclusive, under an agreement of lease thereof, bearing date the 24th day of March, A. D. 1883, made between R. Suydam Grant as lessor and the said railway company as lessee.

It is provided in the said lease that the said railway Co. shall pay to the said lessor, on the days hereinafter set out, at the said office of the American Loan and Trust Company, the following sums, viz:

On the tenth day of each month in the first and second years of the term of this lease, beginning with May 10th, 1883, the sum of fifteen hundred dollars.

On the tenth day of each month in the third and fourth years of the term of this lease, beginning with May 10th, 1885, the sum of fourteen hundred dollars.

On the tenth day of each month in the fifth year of the term of this lease, beginning with May 10th, 1887, the sum of thirteen hundred dollars, the final payment to be made April 10th, 1888; which sums shall be applied by the said lessor to the payment and redemption of the bonds and coupons of this series at par, as they severally mature, upon the surrender of such bonds and coupons.

It is further provided in said agreement that in case of a default in the payment of the sums of money as above specified, or any part thereof, on the day when the same falls due, or in default of the payment of any of said bonds at their maturity, or in case the said railway company shall violate said agreement in any respect

whatever, the said lessor herein shall have the right and shall upon the written request of the holders of a majority of the bonds of this series remaining unpaid, upon being indemnified for any expense he may incur in taking possession of and selling said rolling stock, enter upon the premises of said railway company and take possession of any and all said rolling stock which shall have been delivered to said railway company and have the right to sell the same at public or private sale and apply the proceeds to the payment of said bonds, and if there should be any deficit the said railway company shall pay the same on demand.

It is further provided in said lease that said railway company shall keep said rolling stock in good repair at its own expense and shall further keep the same fully insured at its own expense, any loss being payable to said lessor for the holders of said bonds, and shall pay all taxes that may at any time be levied or assessed upon the same.

In witness whereof the seal of the said The Cincinnati Northern Railway Company has been hereunto affixed and attested by the signature of the president and secretary of said company, at Cincinnati, Ohio, the first day of May, A. D. 1883.

THE CINCINNATI NORTHERN RAILWAY COMPANY,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

$30.00. *Coupon.* $30.00.

The Cincinnati Northern Railway Company will pay thirty dollars to bearer at the office of the American Loan and Trust Company, in the city of Boston, on the first day of ——, 188–, being six months' interest on its equipment bond No. —, series F.

—— ——, *Secretary.*

It is hereby further agreed that each of the said bonds, after execution and before delivery thereof to the said lessor, shall be countersigned or indorsed by the American Loan and Trust Company substantially as follows, viz:

The American Loan and Trust Company hereby certifies that this bond is one of the series of seventy-two bonds issued under the provisions of the agreement mentioned within.

"AMERICAN LOAN AND TRUST COMPANY," *Trustee,*
By —— ——, *Actuary.*

It is further agreed that the sums to be paid by the said lessee in monthly payments as aforesaid on the 10th day of each month during the term of this lease, beginning with the tenth day of May, 1883, shall be applied by the said lessor to the payment and redemption of the said bonds and coupons of the said "series F" at par as they shall severally mature upon surrender of the said bonds and coupons.

It is hereby further agreed that the said lessor and all persons, partnerships, and corporations who may become holders of the said bonds and coupons shall constitute, for the purposes of this agreement, and be known as the "Massachusetts car trust," and that for the purpose of designating the equipment and rolling stock hereby leased as the property of the said lessor and is held by the said lessee under this agreement the said lessee shall cause to be painted in a conspicuous place, so that it can be plainly read, upon each locomotive and tender hereby leased the following: "Massachusetts car trust, series F," and that in the event that any such mark or designation is destroyed the lessee shall immediately restore the same, and that the said lessee shall do all such other things, whether in the execution of written instruments or otherwise, as the counsel of the lessor shall deem necessary for the protection of the said lessor or any members of the said Massachusetts car trust as owners of the said rolling stock.

It is further agreed that the said lessee will not use nor allow the said railroad equipment and rolling stock to be used otherwise than is herein permitted, nor remove nor allow the same to be removed from the railroads whereon the same may so lawfully be used, nor sell, assign, transfer, or dispose of the same or of this lease without the written consent of the said lessor first had and obtained, and that the said lessee shall and will, at least once in each year during the continuance of the lease, render to the said lessor a full and accurate statement and account of said railroad equipment and rolling stock.

It is further agreed that the said lessee shall keep the railroad equipment and rolling stock in proper and complete repair and working condition during the operation of this lease, reasonable wear and tear alone excepted, and such repairs and work done in order to keep the said equipment and rolling stock in such good order and condition shall be made and maintained to the satisfaction of the lessor.

It is further agreed that in case any portion of such rolling stock shall, during the continuance of this lease, from any cause, unavoidable accidents not excepted, be destroyed or injured beyond repair, the said lessee shall and will, at its own cost and as often as may be necessary, replace the railroad equipment and rolling stock that may be so destroyed or injured by other railroad equipment and rolling stock of equal value and of like material, character, and construction; and if all or either of them or any portion of each kind be in any way lost or destroyed or injured as aforesaid prior to the actual redelivery to the lessor and the same are not replaced as above provided, then the full amount of all rental herein agreed to be paid and the bonds representing the same shall, notwithstanding anything herein contained, become immediately due and payable and shall be paid by the said lessee to the said lessor, and in case said railroad equipment and rolling stock shall be returned to or be reclaimed by the said lessor under the provisions of this lease in a damaged condition, ordinary wear and tear alone excepted, the amount of any damage so done shall be paid by the lessee to the said lessor, which

said damage shall be conclusively determined, without right of appeal, by the written finding of all or of a majority of three arbitrators to be appointed, one by each of the parties of the first part and a second part and a third by the two first chosen. If within five days after notice to the party of the second part to name an arbitrator one be not named by them, the party of the first part may forthwith name the three, who shall act with like effect as if they had been mutually chosen.

It is further agreed that the said lessee shall, at the request of the said lessor, have the said railroad equipment and rolling stock insured for the benefit of the said lessor and the said Massachusetts car trust as aforesaid to such an amount as may be required by the said lessor, and shall pay for and keep the said railroad equipment and rolling stock so insured for and during the continuance of this lease, and deposit the policies of insurance with the said lessor so indorsed that the loss, if any, shall be payable to the said lessor; but the said lessor may, at his option, cause insurance to be effected in such companies and in such manner as he may from time to time think best, and the said lessee shall and will, on demand, pay the premiums for such insurance and other expenses as may be incident thereto.

It is further agreed that the said lessor shall have the right at all reasonable times and as often as he shall deem it advisable by his agents or servants to examine and inspect the said railroad equipment and rolling stock for the purpose of ascertaining whether the said lessee is complying with the terms of this contract, and the said lessee shall pay to the said lessor the reasonable expense of such examinations and inspections.

It is further agreed that the said lessee, in case the said lessor seize the said rolling stock and equipment or any part of it for any violation of the provisions of this agreement, shall, on demand of said lessor, place all of such rolling stock and equipment so seized upon any side track or side tracks of said lessee and hold the same without use or charge, subject to the order of said lessor and as his agent, and if deemed advisable by said lessor shall and will transport such equipment and rolling stock to any other point on the line of its railroad designated by the said lessor at the expense of the said lessee.

In case the said lessee shall fail to pay any of the sums of money herein agreed to be paid by it or any portion of any of said sums of money as and when the same are due and payable according to the true intent and meaning of this lease, or in case it shall fail in any of the undertakings by it hereby entered into or shall fail to perform, any of the stipulations, promises, or agreements herein contained, as on its part to be kept and performed, then and in that case the said lessor may, at his option, and shall upon the written request of the holders of a majority of the bonds of this series remaining unpaid, upon being indemnified for any expense he may incur in taking possession of and selling said rolling stock, without notice, take possession of the said rolling stock and equipment and remove the same, and shall sell the same, with or with-

out notice, at his option, at public or private sale, at his option, and apply the proceeds thereof, after deducting the expenses of such sale, to the payment of the then outstanding bonds and coupons; and if the amount realized from such sale shall be insufficient to pay the amount due upon such bonds and coupons, then the said lessee shall pay the deficiency upon demand; and in case of such proceedings the principal of all the bonds issued as aforesaid shall forthwith become due and payable.

After the said lessee shall have faithfully performed all the stipulations of this lease in the manner and form as herein provided without default and shall have made all the payments herein agreed to be made by it according to the true intent and meaning hereof, then the said lessee may, at its option, at any time within one month after the time of maturity, as above, of the last instalment of rent, purchase said railroad equipment and rolling stock at the price of one dollar for each such locomotive and tender, and upon the payment of said sum to him the said lessor shall thereupon sell and by bill of sale convey said railroad equipment and rolling stock to said lessee.

Nothing herein contained and no action hereunder shall divest the title of the said lessor to said railroad equipment and rolling stock until the rents above enumerated and the other sums of money herein agreed to be paid by the said lessee shall have be- fully paid by said lessee and until a bill of sale therefor shall have been delivered. Until after such payment and delivery the said railroad equipment and rolling stock shall remain the property of said lessor, and no right whatever thereto shall pass to the said lessee excepting that of using the same in strict compliance with the terms of this contract.

The said lessor may sell and assign to the said American Loan and Trust Company the said rolling stock and railroad equipment and this lease, and any such sale and assignment shall vest in the assignee, and the assignee shall have and possess all the property, rights, powers, and remedies which are now held, owned, or possessed by or belong to the said lessor in respect of the said railroad equipment and rolling stock.

In case of non-payment of the principal of or interest on any or all of the aforesaid bonds there shall be no liability on the part of the said lessor or said American Loan and Trust Company to pay the principal of said bonds or the interest thereon, except to apply thereto the rental to be paid by the said lessee as aforesaid, and there shall be no right of action by reason of such non-payment against said lessor or against said American Loan and Trust Company, and neither of them shall be made liable for any default of or non-payment by said lessee.

In witness whereof the said party hereto of the first part has hereunto set his hand and seal, and the said party hereto of the second part has caused its corporate seal to be hereto affixed, attested

by its secretary, and these presents to be signed by its president the day and year first above written.

Executed in duplicate.

(Signed) R. S. GRANT.
CINCINNATI NORTHERN RAILWAY COMPANY,
By E. B. PHILLIPS, *President.*

Attest:
[SEAL.] P. L. DUDLEY, *Secretary.*

STATE OF OHIO, *County of Hamilton,* } ss:

I, George F. Meyers, do hereby certify that E. B. Phillips, personally known to me to be the same person whose name is subscribed to the foregoing instrument as having executed the same by the authority and in behalf of the Cincinnati Northern Railway Company, appeared before me this day in person and acknowledged that he caused the corporate seal of the said company to be affixed to and signed and delivered the said instrument as the free and voluntary act of the company for the uses and purposes therein set forth.

Given under my hand and official seal this 9th day of April, 1883.

GEORGE F. MEYERS, [SEAL.]
Notary Public, Ham. Co., O.

THE UNITED STATES OF AMERICA, *Southern District of Ohio, Western Division,* } ss:

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing exhibit is a full, true, and correct copy of the original on file in this office.

In testimony whereof I have hereunto set my hand and seal of said court, at the city of Cincinnati, O., this 23rd day of January, A. D. 1890.

[SEAL.] B. R. COWEN, *Clerk,*
By R. C. GEORGI, *Deputy.*

(Endorsed:) No. 3554. United States circuit court, southern district of Ohio, western division. Exhibit equipment lease, R. Suydam Grant to the Cin'ti Northern R'y Co. Massachusetts car trust, series F.

* * * * * * *

(Record, p. 32.)

And afterwards, to wit, on the 1st day of November, A. D. 1883, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal V, p. 183.

This day came W. J. Craig, heretofore appointed receiver of the Cincinnati Northern railroad, and filed his bond herein in the sum of ten thousand dollars, which is approved by the court.

And thereupon the said William J. Craig took the oath prescribed by law and was duly qualified.

* * * * * * *

(Record, p. 605 to p. 608, incl.)

SCHEDULE B.

Circuit Court of United States, Southern District of Ohio, Western Division.

THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, Complainant, *against* GRANVILLE D. BRAMAN, THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY, *et al.*, Respondents. } In Equity. # 3554.

Answer of W. J. Craig, Receiver.

Saving and reserving unto himself all exceptions and benefits arising to him on account of the insufficiencies of the petition of the complainants herein, the said W. J. Craig, receiver, etc., now comes and for answer to said petition admits the agreement of lease, as set forth in said petition, and admits default in payment according to the terms of the same, as set forth in said petition, but denies that said locomotives and tenders have been depreciated in value to the extent of ten thousand dollars ($10,000.00), as in said petition stated, and denies upon information and belief that they have been depreciated in any sum whatever, and avers that, on the contrary, they are now in good marketable condition. He denies, therefore, that there is anything due the petitioners in excess of the sum of six thousand seven hundred and ninety-eight and $\frac{33}{100}$ ($6,798.33) dollars.

And this respondent, further answering, says that all said locomotives are in his possession as receiver and necessary to the successful operation by him of said road under and in accordance with the orders of this court herein, and he prays, therefore, that the court will, upon the hearing of this matter, make such order as will enable him to retain the possession and use of said locomotives and tenders and at the same time fully protect the rights of the petitioners herein.

W. J. CRAIG,
By J. B. FORAKER,
His Solicitor.

UNITED STATES OF AMERICA, *Southern District of Ohio, Western Division,* } *ss:*

W. J. Craig, being first duly sworn, says that his foregoing answer as receiver is true in so far as the statements therein made are based upon his personal knowledge and in so far as the same are made upon information and belief he believes them to be true.

W. J. CRAIG.

Sworn to before me and subscribed in my presence by said W. J. Craig this 5th day of December, A. D. 1883.

CHAS. E. PRIOR,
[SEAL.] *Notary Public, Hamilton Co., Ohio.*

SOUTHERN DISTRICT OF OHIO, *ss:*

A true and correct copy of the original on file in this office.
Attest: B. R. COWEN, *Clerk,*
[SEAL.] By ROB'T C. GEORGI, *Deputy.*

(Endorsed): No. 3554. United States circuit court, southern district of Ohio, western division. The Central Trust Co. of New York *vs.* Granville D. Braman *et al.* Answer of W. J. Craig, rec'r, to int. pet. of R. S. Grant. Filed Dec. 6, 1883. Wm. C. Howard, clerk. J. B. Foraker, attorney for resp'd't.

(Record, pp. 609 & 610.)

SCHEDULE C.

J. B. Foraker. L. C. Black. J. R. Foraker. N. Rockhold.

Law office of Foraker & Black, rooms 44 and 45 Pike's Opera-House.

CINCINNATI, *Dec.* 17, 1883.

Hon. George R. Sage, Columbus, O.

DEAR JUDGE: Mr. Wilson is anxious to get his judgment. I don't know of any reason why he should not have it.

He has prepared entries, to which I see no objection, in accordance with the distribution of his property.

I don't know of any good I could do by going with him to see you. By my answers I made no issue, except as to damages, and by his decrees he waives that claim.

Very truly, J. B. FORAKER.

SOUTHERN DISTRICT OF OHIO:

A true and correct copy of original letter filed in case # 3578, U. S. circuit court, southern dist. of Ohio.
Attest: B. R. COWEN, *Clerk,*
By R. C. GEORGI, *Deputy.*

* * * * * * *

(Record, p. 36 to p. 39, incl.)

And afterwards, to wit, on the 22nd of December, A. D. 1883, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal W, page 215.

In the matter of the intervening petition of R. S. Grant.

The said cause came on to be heard upon the petition and the answer of the receiver thereto and upon the evidence submitted on behalf of said petitioner.

And it appearing to the satisfaction of the court that the receiver has in his possession Grant locomotives No. 73, and is using the same in the operation of the said Cincinnati Northern Railway Co. between Cincinnati and Dayton, Ohio, and that said locomotive is one of the ten covered by the agreement of lease set out in said petition, and was acquired by said railway company under the terms of said agreement and *and* was so held at the date of the appointment of the receiver herein;

And it further appearing that the present receiver or his predecessor took the said locomotive, with its tender, into his possession as such receiver on the first day of August last, and has had the same in continuous use and possession since that date without having made any of the monthly payments of rental as provided in said indenture of lease, or other compensation for the use thereof;

And it further appearing that the said locomotive is, in the judgment of the receiver, necessary to the proper operation of said railway and should be acquired as part of its permanent equipment, and that the value of said locomotive as fixed in said agreement of lease is reasonable, and that the petitioner, R. S. Grant, the owner of said locomotive and tender, is willing, upon receipt of the contract price or upon being adequately secured therein, to transfer the title of the same to the receiver;

And the matter being fully heard by the court and upon due deliberation thereon, it is hereby ordered, adjudged, and decreed that the receiver pay to the said petitioner as rental for said locomotive and tender and in full for all claims for rental, interest, and repairs down to the first day of Dec., 1883, the sum of $770.48, the same being the amount due to said date under the terms of said lease.

And the further sum of $7,520.00, balance in full as purchase-money for said locomotive and tender.

And it is further ordered that the receiver pay said several amounts as part of the operating expenses of the said railway out of any money not appropriated for the payment of current labor, supplies, and taxes.

And it is further ordered and decreed that the said several amounts, with interest thereon at the rate of six per cent. from the 1st day of December, 1883, shall be a charge upon the earnings, income, and all the property of the said Toledo, Cincinnati and St. Louis Railroad Company, and especially of the said Cincinnati Northern Rail-

way Company, as ahead of the first mortgage or other bonded debt of said company or either of them; and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of the said railways shall be a first lien thereon, and the said sale shall be made subject thereto.

(Record, pp. 39 & 40.)

And afterwards, to wit, on the 22nd day of December, A. D. 1883, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal V, p. 216.

The said cause came on to be heard upon the petition and the answer of the receiver thereto and upon the evidence submitted on behalf of said petitioner.

And it appearing to the satisfaction of the court that the receiver has in his possession Grant locomotives numbered 67, 68, and 72, with their tenders, and is using the same in the operation of the said Southeastern Division of the said defendant company's railroad, between Dayton and Wellston, Ohio, and that the said locomotives are three of the ten covered by the agreement of lease set out in said petition and were acquired by said railway Co. under the terms of said agreement and were so held at the date of the appointment of the receiver herein;

And it further appearing that the present receiver or his predecessor took the said locomotives into his possession as such receiver on the 1st day of August last and has had the same in continuous use and possession since that date without having made any of the payments of rentals, as provided in said indenture of lease, or other compensation for the use thereof;

And it further appearing that the said locomotives are, in the judgment of the receiver, necessary to the proper operation of the said railway and should be acquired as part of its permanent equipment, and that the value of said locomotives and tenders as fixed in said indenture of lease is reasonable, and that the petitioner, R. S. Grant, the owner of said locomotives and tenders, is willing, upon the receipt of the contract price or upon being adequately secured therein, to transfer the title of the same to the receiver;

And the matter being fully heard by the court and upon due deliberation thereon, it is ordered, adjudged, and decreed that the receiver pay to the said petitioner as rental for said locomotives and in full for all claims for rentals, interest, and repairs down to the first day of Dec., 1883, the sum of $2,311.41, the same being the amount due to said date under the terms of said lease, and the further sum of $22,560.00, balance in full as purchase-money for said locomotives and tenders.

And it is further ordered that the receiver pay said several amounts as part of the operating expenses of the said Southeastern Division out of any money not appropriated for the payment of current labor, supplies, and taxes.

And it is further ordered and decreed that the said several amounts, with interest thereon, at the rate of six per cent., from the 1st day of December, 1883, shall be a charge upon the earnings, income, and all the property of the said Toledo, Cincinnati and St. Louis Railroad Co., and especially of the said division, prior to the 1st mortgage or other bonded debt of said railroad of said division thereof, and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of said railroad or said division shall be a first lien thereon and the said sale shall be made subject thereto.

(Record, pp. 41 & 42.)

And afterwards, to wit, on the 7th day of March, A. D. 1884, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal V, page 277.

In the matter of the intervening petition of R. S. Grant.

Upon motion of The Central Trust Company, complainant, and for good cause shown, it is ordered that the decree heretofore made in this cause on the 22nd day of December, 1883, whereby it was ordered, adjudged, and decreed that the receiver heretofore appointed in this cause pay to said R. S. Grant, out of any moneys in his hands not specifically appropriated, the sum of twenty-three hundred and eleven $\frac{41}{100}$ dollars ($2,311.41) in full for the rent up to December 1st, 1883, of the Grant locomotives Nos. 67, 68, and 72, and the further sum of twenty-two thousand five hundred and sixty dollars ($22,560.00) as the balance of the purchase-money due upon said locomotives, and that the same, with interest at the rate of six per cent. per annum, be a first and best lien upon the property of the said Toledo, Cincinnati & St. Louis R. R. Co., and especially upon the Dayton and Southeastern Division thereof, prior to the first mortgage thereon or to the bonded debt of said company, and that any sale thereof take place subject to the same, be, and the same hereby is, suspended until the further order of this court; to all of which the petitioner aforesaid objects.

And afterwards, to wit, on the 7th day of March, A. D. 1884, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal V, page 278.

In the matter of the intervening petition of R. S. Grant.

Upon motion of The Central Trust Company, complainant, and for good cause shown, it is ordered that the decree heretofore made in this cause on the 22nd day of December, 1883, whereby it was ordered, adjudged, and decreed that the receiver heretofore appointed in this cause pay to said R. S. Grant, out of any moneys in his hands not specifically appropriated, the sum of seven

hundred & seventy $\frac{48}{100}$ dollars ($770.48) in full for the rent up to December 1st, 1883, of the Grant locomotives No. 73, and the further sum of seventy-five hundred and twenty dollars ($7,520.00) as the balance of the purchase-money due upon said locomotives, and that the same, with interest at the rate of six per cent. per annum, be a first and best lien upon the property of the said Cincinnati Northern R'y Co. and of the said Cincinnati, Spring Grove and Avondale Railway Co. prior to the first mortgage thereon or to the bonded debt of said company, and that any sale thereof take place subject to the same, be, and the same hereby is, suspended until the further order of this court.

To all of which the petitioner aforesaid objects.

(Record, p. 43 to p. 55, incl.)

And afterwards, to wit, on the 15th day of March, A. D. 1884, the following petition for rehearing was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Petition for Rehearing.

Circuit Court of the United States, Southern District of Ohio. In Chancery.

THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation,
against
THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD CO., THE CINCINNATI NORTHERN RAILWAY CO., and Others. } No. 3554.

To the judges of the circuit court of the United States for the southern district of Ohio:

The Central Trust Co. of New York, a corporation under the laws of said State, showeth unto your honors that it is the complainant in this cause, wherein, on the 14th day of August, 1883, it filed its certain bill of complaint against The Toledo, Cincinnati and St. Louis Railroad Co., The Cincinnati Northern Railroad Co., and others, defendants, praying for the foreclosure of a certain mortgage known as the first mortgage upon the railroad and property of the said Cincinnati Northern Railway Co., wherein it was mortgagee, which mortgage was made on the first day of October, 1880, by said railway company to said complainant to secure one thousand bonds of the said last-named railway Co. of even date with said mortgage, with interest thereon at the rate of six per cent. per annum, payable semi-annually, which said mortgage is the first and best lien on said property of said railway Co.; and further praying for a sale of the mortgaged premises and for the appointment of a receiver to operate said railway, all of which will more fully appear by said bill of complaint herein filed, for which purpose reference is now had thereto.

And your petitioner further showeth that on the 20th day of October, 1883, one William J. Craig was by this court appointed receiver of all the railroad and property of said Cincinnati Northern Railway Co. included within said mortgage, and that the said Craig

duly qualified as such receiver in pursuance of said appointment, and ever since has been and now is in the possession of said property, operating the same as such receiver.

And your petitioner further showeth that on the 27th day of October, A. D. 1883, one R. Suydam Grant, by leave of this court, filed in this court in this cause a certain application or intervening petition setting forth that on or about the 24th day of March, 1883, the said Grant had made and entered into a certain arrangement or contract with the said Cincinnati Northern Railway Co. by which he agreed to furnish, on the terms set forth therein and exhibits to the same attached and on file in this cause, certain rolling stock, to wit, 10 locomotives and tenders, marked and numbered from 67 to 76, inclusive, made by the Grant Locomotive Works, Paterson, N. J., and further setting forth that said rolling stock had been delivered to and received by said Cincinnati Northern Railway Co. and that partial payments had been made therefor on account of the said contract price of said rolling stock, and also on account of the agreed rent for the use thereof by said Cincinnati Northern Railway Co.; and for a greater certainty as to the allegations of the said Grant in said petition in respect to the alleged sale and lease of said rolling stock to said Cincinnati Northern Railway Co. and of the delivery of the same to it and of payments to him by it on account thereof as well for the price thereof as for rent, reference is now made to the intervening petition of the said Grant and exhibits to the same now on file in this cause.

And your petitioner further showeth to your honors that afterwards, on the 22nd day of December, 1883, the said Grant procured to be made in this cause upon said intervening petition a certain entry or order purporting to find that the said William J. Craig, as receiver of the Cincinnati Northern Railway Co., had in his possession one of the locomotives mentioned in said petition of said Grant, to wit, locomotive No. 73, and was using the same in the operation of the said Cincinnati Northern railway between Cincinnati, Ohio, and Dayton, Ohio, and that the said locomotive was acquired by said Cincinnati Northern Railway Co. under the terms of said alleged agreement, and was so held at the time of the appointment of said receiver herein; and further purporting to find that the said William J. Craig or his predecessor had taken said locomotive, with its tender, into his possession on the first day of August, 1883, and had used the same since that date without any compensation therefor; and further purporting to find that said locomotive was, in the judgment of said receiver, necessary to the proper operation of said Cincinnati Northern railway and should be acquired as part of its permanent equipment, and that the value of said locomotive fixed by said agreement of lease was reasonable, and that the said Grant was the owner thereof and was willing upon the receipt of the contract price or upon being adequately secured therein to transfer the title therein to the receiver, and purporting to adjudge and decree, after an alleged full hearing and upon an alleged due inquiry, that said receiver pay to said Grant as rent for said locomotive and tender the sum of seven hundred and seventy

dollars and forty-eight cents and the further sum of seven thousand five hundred and twenty dollars, the balance in full of purchase-money for said locomotive and tender; and further purporting to adjudge and decree that said receiver pay said several amounts to said Grant as part of the operating expenses of said railway out of any money not appropriated for the payment of current labor, supplies, and taxes; and purporting further to adjudge and decree that said several amounts, with interest at the rate of six per cent. from the first day of December, 1883, should be a charge upon the earnings, income, and all the property of the said Toledo, Cincinnati and St. Louis Railroad Co., and especially of the said Cincinnati Northern Railway Co., ahead of the first mortgage or other bonded debt of said company or either of them, and that any balance of said amounts remaining unpaid at the date of the foreclosure and sale of said Cincinnati Northern railway shall be a first lien thereon, and the said sale should be made subject thereto.

And your petitioner further showeth that the said R. S. Grant, under said intervening petition hereinbefore mentioned, procured to be made without the knowledge or consent of the complainant herein and under circumstances exactly similar to those attending the procurement of the order hereinbefore last mentioned a certain other order or decree in this case on said 22nd day of December, 1883, at the same time that the order last hereinbefore mentioned was made, which said second order purported to find that some person denominated in said order as "the receiver" had in his possession Grant locomotives numbered 67, 68, and 72, with their tenders, being part of those mentioned in said intervening petition; and said order further purporting to find that said person so denominated "receiver" was using the same in the operation of something termed in said order the said "The Southeastern Division of the said defendant company's railroad, between Dayton and Wellston, Ohio," and that said locomotives 67, 68, and 72, with their tenders, were acquired by "said railway company" under the terms of said alleged agreement mentioned in the intervening petition of said R. S. Grant and were so held at the date of the appointment of the "receiver" in this cause; and said order further purporting to find that the present receiver, not naming him, or his predecessor took said locomotives into his possession, as such receiver, on the first day of August last, and has had the same in continuous use and possession since that day; and further purporting to find that said locomotives *was*, in the judgment of "the receiver," necessary to the proper operation of the said "railway," and should be acquired as part "of its permanent equipment," and, in short, purporting to find the value of said locomotives and tenders, as fixed in said pretended agreement of lease, reasonable, and finding the balance due on account thereof twenty-two thousand five hundred and sixty dollars and the balance due on account of rent thereof two thousand three hundred and eleven dollars and forty-one cents, and finding that said Grant was willing to transfer the title of said engines and tenders upon payment of said sums, of which willingness your petitioner has a doubt; and further purporting to order "the receiver" to pay said

several amounts as part of the operating expenses "of the said Southeastern Division" out of any moneys not appropriated for payment of current labor, supplies, and taxes; and said decree further purported to direct that said several sums, with interest at six per cent. from the first day of December last, be a charge upon the earnings, income, and all the property of the said Toledo, Cincinnati and St. Louis Railroad Co., and especially "of the said division," prior to the first mortgage or other bonded debt of said railroad or said division thereof, and that any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of said railroad on said division should be a first lien thereon and the said sale should be made subject thereto.

And your petitioner further showeth unto your honors that no order or process of any sort was made or issued against it requiring the allegations of said petition to be answered by the complainant in said cause, as should have been done, and that it had no notice whatever of any application for the making of either of said orders as aforesaid upon the intervening petition of the said Grant, and that if it had had notice of either of said orders before the same were made it would have resisted the making thereof, and that it had no notice that said orders had been made in this cause upon the petition of said Grant in this cause until the fact thereof was stated on the 26th day of February, 1884, to the judges of the circuit court of the United States for the sixth and seventh circuits, sitting at the city of Indianapolis, Indiana, by the counsel who obtained said orders; and thereupon notice was immediately given to said counsel of the intention of the complainant in this cause to apply for the setting side of said orders, and upon the application of the complainant herein in pursuance thereof orders were made in this cause by this court on the 7th instant suspending said orders until the further action of the court in that behalf.

And your petitioner further showeth unto your honors that said orders upon the intervening petition of said Grant in this cause were entered by this court by inadvertance and from misapprehension, the court acting in that behalf upon the belief that the making of said orders had been assented to by your petitioner, who is the complainant in this cause; but your petitioner says that it never did assent to the entering of said orders and had no knowledge whatever that the same were proposed to be entered.

And your petitioner further showeth that said orders were entered without any hearing and without any legal or competent evidence whatever to support the findings therein purporting to be made or the allegation of the intervening petition of the said Grant.

And the finding in said orders that the present receiver, William J. Craig, or his predecessor had been in possession of said locomotives since the first of August last and using the same in the operation of the said Cincinnati Northern Railway Co. between Cincinnati, Ohio, and Dayton, Ohio, or in the operation of the "said Southeastern Division of the said defendant company's railroad between

Dayton and Wellston, Ohio," is not only untrue, but impossible, because your petitioner says that William J. Craig was not appointed receiver of said Cincinnati Northern railway or of said railroad mentioned in said second order until the 20th day of October, 1883, which latter appointment was made not in this cause, but in another cause in which your petitioner is also complainant, seeking as mortgagee to foreclose the first mortgage thereon made by the Toledo, Delphos and Burlington railroad, which owned the same at the time of the execution of said mortgage, and that he had no predecessor whatever as such receiver, and the said Cincinnati Northern railway has never at any time extended from Cincinnati to Dayton, Ohio, but only from Cincinnati to a point called Dodds, in Warren county, Ohio, which is twenty-five or thirty miles south of Dayton.

And your petitioner further represents that the said Craig was never in this case appointed receiver of what is described in the second of said orders as "the said Southeastern Division of said defendant company's railroad, between Dayton and Wellston, Ohio," and that the railroad intended to be described thereby is an entirely distinct and separate railroad from the Cincinnati Northern railroad.

And your petitioner further showeth that all the allegations of the said petition of the said Grant, so far as the same seek to affect the Cincinnati Northern Railway Co. or the railroad described in said second order as "the said Southeastern Division of the said defendant company's railroad, between Dayton and Wellston, Ohio," are untrue in fact, and that it has no knowledge as to whether said alleged contract between the said Grant and the Cincinnati Northern railway of the sale or lease of said rolling stock mentioned in the said intervening petition of the said Grant was in fact made, and therefore denies the same, but further showeth that if said contract was so made it was made after the consolidation of the Cincinnati Northern Railway Co. with the Toledo, Cincinnati and St. Louis Railroad Co. had been agreed upon by said respective companies and by the same persons who were officers at the time of the said Toledo, Cincinnati and St. Louis Railroad Co., and without the knowledge and consent of this complainant, and that said rolling stock was not constructed for the benefit or use of the said Cincinnati Northern Railway Co., but for the use of the said Toledo, Cincinnati and St. Louis Railroad Co. on portions of its road in the States of Illinois and Indiana, and the name of the Cincinnati Northern Railway Co. was used for the purpose of buying said rolling stock for said Toledo, Cincinnati and St. Louis Railroad Co. as a mere cover for said transaction, and that said rolling stock was not at the date of said alleged contract needed by said Cincinnati Northern Railway Co. for the operation of its said road, and the same is not now and has never since then been needed therefor; that at the time the receiver was appointed in this case the said Cincinnati Northern Railway Co. had and now has sufficient rolling stock to operate said road, and that the said Cincinnati Northern Railway Co. never received any of the locomotives mentioned in

said intervening petition of said Grant and never paid anything on account thereof either as rent or otherwise.

And your petitioner further showeth that the prices for said locomotives and also the rental thereof set forth in the intervening petition of the said Grant and exhibits thereto attached are extravagant, excessive, and far above the true value of said locomotives either at the date of said alleged contract or at the time of entering said orders or at the present time.

And your petitioner further showeth in further denial of the allegations of said intervening petition of said Grant that it has no knowledge or information as to default in the payment of the monthly rental for said rolling stock by the said consolidated railroad company mentioned in said intervening petition, and therefore denies the same, and that it is not true that the said W. J. Craig was by this court appointed to succeed the said E. E. Dwight as receiver of the said Toledo, Cincinnati and St. Louis Railroad Co., and it is not true that any such thing will appear by the records of this court; that it is not true that the said Craig, as receiver in this cause, has seized or taken possession of any of the rolling stock mentioned in said petition.

And your petitioner further shows that it has no knowledge whether or not said Grant be entitled under said alleged agreement to take possession of said rolling stock mentioned in said intervening petition, and therefore denies the same; but it further says that if he be so entitled to take possession it has no objection to his doing so; and, further, it has no knowledge or information as to whether said six per cent. equipment trust bonds mentioned in said petition are due or payable or whether said Grant is the owner or holder of any of the same, and therefore denies all allegations in said intervening petition relative thereto.

And your petitioner further says that it has no knowledge or information as to whether said rolling stock has become deteriorated, or that it has been used by said Craig as such receiver, and denies that said Grant is entitled to any reimbursement for any such alleged deterioration. As to whether there is any balance due said Grant on account of said alleged rental of said rolling stock mentioned in said intervening petition, your petitioner says it is ignorant, and therefore denies the same, and that it is likewise ignorant as to whether there is anything due said petitioner on account of monthly rentals, half-yearly interest, repairs, or otherwise for said rolling stock, and therefore denies the same.

And your petitioner further showeth that the said Grant has no claim at law or in equity for the relief or any part thereof asked for in said intervening petition and granted in said orders as against said Cincinnati Northern Railway Co. or said Toledo, Delphos and Burlington Railway Co., which your petitioner supposes is the railroad referred to in said second order as "the Southeastern Division of the said defendant company's railroad."

Your petitioner showeth that no interest has been paid out of earnings of either of said roads on 1st-mortgage bonds.

Wherefore your petitioner prays that this petition may be taken

as well for an answer to the said intervening petition of R. Suydam Grant as for a petition for rehearing or review of said intervening petition and of the orders so as aforesaid erroneously and inadvertently made thereunder; and your petitioner further prays that the said orders may be annulled, set aside, and held for naught; that the said R. Suydam Grant may be decreed to pay to your petitioner its reasonable costs and expenses in this behalf incurred, and that it (your petitioner) may be decreed to have such other and further relief as shall be in conformity to the course of equity and to good conscience.

HOADLEY, JOHNSON AND COLSTON,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
Southern District of Ohio, Hamilton County, } *ss:*

Edward Colston, being by me first duly sworn, says that he is one of the solicitors of The Central Trust Co. of New York, the complainant in this cause, and that he has read the foregoing petition and is familiar with the contents thereof, and that the matters and things therein stated are true, except where stated on information and belief, and those he believes to be true.

EDWARD COLSTON.

Sworn to before me and subscribed in my presence March 13, 1884.

[SEAL.]

JNO. F. JOCKEL,
Notary Public, Ham. Co., O.

(Record, p. 56 to p. 72, incl.)

And afterwards, to wit, on the 29th day of March, A. D. 1884, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal V, p. 301.

Decree for Sale of Cincinnati Northern Railway.

This cause came on to be further heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

The court finds from the pleadings, exhibits, and evidence that the defendant, The Cincinnati Northern Railway Company, was on the 1st day of October, 1880, a corporation, under the laws of Ohio, engaged in the construction and equipment of a certain railroad and appurtenances from a point in the city of Cincinnati, in the county of Hamilton and State of Ohio, northwardly, in and through the counties of Hamilton, Butler, and Warren, in said State, to the village of Waynesville, in said county of Warren, and that said Cincinnati Northern Railway Company did, on said last-named day, in pursuance of proper corporate authority, execute one thousand of its bonds for the sum of one thousand dollars each, dated

the said first day of October, 1880, payable on the first day of October, A. D. 1920, and that each of said bonds bore interest at the rate of six per cent. per annum, payable semi-annually on the 1st days of April and October of each and every year, at the city of New York, and each of said bonds having interest warrants for thirty dollars each thereto attached, payable at the place and times last named, and that the said Cincinnati Northern Railway Company, prior to the commencement of this suit, had duly issued and sold one thousand of the said bonds, with said interest warrants to the same attached, and that said bonds and said interest warrants are now in the hands of divers and sundry persons as owners and holders thereof.

And the court further finds that to secure the payment of said bonds and the payment of the said interest as the same should mature the said Cincinnati Northern Railway Co., in pursuance of proper corporate authority therefor, did on said first day of October execute and deliver unto the said Central Trust Co. of New York, the complainant herein, a corporation under the laws of the State of New York, a certain deed or indenture of mortgage, whereby said Cincinnati Northern Railway Company did grant, bargain, sell, and convey in fee simple unto the complainant herein, its successors and assigns, all and singular the railroad known as the Cincinnati Northern railway, extending from a point in said city of Cincinnati to said village of Waynesville, in said county of Warren, and passing through and into the counties aforesaid, about forty-two miles in length, as well the part thereof which had been already constructed on said first day of October as the portion that might thereafter be made, together with all the real and personal property of said company connected with said railroad, and also all income derived therefrom and all its lands, tenements, and hereditaments, rights of way, fixtures, buildings, bridges, structures, fences, railways, branches, side tracks, rails, ties, locomotives, tenders, engines, cars, carriages, equipments, rolling stock, machinery, tools, implements, materials, chattels, franchises, and privileges, appurtenances, rights, interests, income, rent, reservations, resources, benefits, investments, assets, and estates, legal and equitable, which were then owned or which should thereafter be acquired or owned by said Cincinnati Northern Railway Co. as part of or in connection with the said railroad or in any way appertaining or belonging thereto; and also all the personalty and movable property of the said Cincinnati Northern Railway Co., including all its locomotives, engines, cars, carriages, equipment, rolling stock, machinery, tools, implements, material, chattels, of every kind and character, wherever used or situated, whether upon the lines of said company's railroad or elsewhere, which were then owned or thereafter should be acquired by said company, which is the same deed or indenture of mortgage mentioned in said bill of complaint marked Exhibit A and filed as part hereof.

And the court further finds that said deed or indenture of mortgage was, on the 17th day of November, A. D. 1880, duly recorded

in the said several counties in or through which said railroad extended.

And the court further finds that the object of said deed or indenture of mortgage was to secure and protect the several persons, firms, and corporations who should hold the said bonds and interest warrants aforesaid or any of them, and that it was provided in said deed or indenture of mortgage that if any default should be made in the payment when due of interest on any of said bonds when and as the same might accrue, then upon the happening of any such default the complainant herein might take proper legal proceedings to enforce the rights of the holders of said bonds upon being thereto requested by the holders of one-third of the amount of the bonds aforesaid, and that the proceeds arising from any sale made in pursuance thereof should be applied, first, to pay the complainant all reasonable costs, charges, and expenses, and to indemnify it against all liability in the premises; second, to pay the holders of said bonds, in full or in equal proportion, the principal and interest of said bonds then outstanding without priority in lien of interest over principal or of one bond over another.

And the court finds that it was further provided in said deed or indenture of mortgage that upon the sale of said premises and property by virtue of the judgment or decree of any court of competent jurisdiction, rendered in any suit or proceeding for the enforcement or foreclosure of the lien of said deed or mortgage, the principal of all the aforesaid bonds should become and be immediately due and payable, and that upon payment in full of interest and principal of said bonds said deed or mortgage should be null and void and of no effect.

And the court further finds that the said Cincinnati Northern Railway Company has failed to pay the interest on said bonds and has made default therein to all the holders thereof to whom said company has failed to pay the interest warrants or coupons due on said bonds October 1st, 1882, and April 1st, 1883, and that the same has ever since remained unpaid, although payment of the *sum* was duly demanded at said city of New York.

And the court does further find that the holders of one-third in amount of said bonds to whom such default was made did, prior to the commencement of this suit, serve upon the complainant herein due demand in writing in accordance with the terms of said mortgage or deed of trust, requiring it to institute this action to foreclose said mortgage and to sell said railway and property of the Cincinnati Northern Railway Company, and for other relief as prayed in the bill of complaint herein, and that this suit was begun in pursuance thereof.

And the court does further find that since the said first day of April, 1883, interest warrants on said bonds of the said Cincinnati Northern Railway Company have fallen due as follows, to wit, the said interest warrants payable on October 1st, 1883, and that the same have remained and still are due and unpaid.

And the court does further find that there is now in arrear and due by the said Cincinnati Northern Railway Co. as interest on the

bonds aforesaid the sum of ninety thousand dollars, with interest at the rate of six per cent. per annum from October 1, 1882, on thirty thousand dollars, a part of said sum; with like interest from April 1, 1883, upon thirty thousand dollars, a part of said sum, and with like interest from October 1, 1883, upon thirty thousand dollars, a part of said sum.

And the court does further find that on and prior to the 25th of April, 1881, the Spring Grove, Avondale and Cincinnati Railway Company was a corporation under the laws of Ohio engaged in constructing and operating a railroad owned by it from a point in the city of Cincinnati, in said State, south of Court street and west of Broadway, in said city, to Spring Grove cemetery, in the county of Hamilton and State of Ohio, and that part of said road at said time had been constructed ready for use, and that thereafter, on or about said last-named day, the said Cincinnati Northern Railway Co., by proper instrument in writing, did lease for a term of ninety-nine years thereafter, renewable forever, the said tracks, road-bed, rights of way, property, privileges, and franchises then owned or thereafter to be acquired by the said Spring Grove, Avondale and Cincinnati Railway Co., with the privilege of purchasing the same at any time after three years, for the sum of five thousand dollars.

And the court does further find that in consideration of said lease to the Cincinnati Northern Railway Co. the said last-named company did execute and deliver to the complainant herein, The Central Trust Co. of New York, on the 25th day of May, 1881, its certain deed of trust by way of mortgage, which is the same deed or indenture mentioned in the said bill of complaint marked Exhibit B and filed as part thereof, whereby it did convey to the complainant herein as such trustee all the aforesaid property, rights, and franchises of the said Cincinnati Northern Railway Co. to secure the payment as the same might mature of the principal and interest of one million dollars of mortgage bonds theretofore purporting to have been issued by the said Spring Grove, Avondale and Cincinnati Railway Co. and purporting to have been secured on the aforesaid railroad of last-named Company payable July 1, 1921, with interest warrants thereto attached for payment of interest at the rate of six per cent. per annum on the first days of January and July of each year.

And the court further finds that said last-named deed of trust or mortgage has been duly recorded and became a lien upon the road and property, hereinbefore described, of the said Cincinnati Northern Railway Co. second to the lien of the said deed of trust or mortgage upon the same property hereinbefore first mentioned.

And the court does further find that the interest on said bonds of said Spring Grove, Avondale and Cincinnati Railway Co. has not been paid, but that both the said Spring Grove, Avondale and Cincinnati Railway Co. and said Cincinnati Northern Railway Co. have failed to pay the interest thereon falling due the first day of January, 1883, and the first day of July, 1883, and that the same has never been paid.

And the court does further find that the said Cincinnati Northern

Railway Co., proper corporate authority for that purpose being first had, did on the 25th day of May, 1881, duly execute and deliver to the complainant herein a certain other indenture, which is the same deed or indenture mentioned in the bill of complaint herein and marked Exhibit C and filed as part thereof, whereby it did convey to said complainant, as trustee, all the railroad, property, rights, goods, and chattels of the said Cincinnati Northern Railway Co., referred to in the mortgage hereinbefore first set forth, to secure the payment at maturity of the principal of one thousand bonds of the said Cincinnati Northern Railway Co., known as income bonds, for one thousand dollars each, numbered consecutively from 1 to 1,000, inclusive, payable on the 1st day of April, 1921.

And the court does further find that no interest has accrued or is due or payable on said last-mentioned bonds under the terms of said last-mentioned mortgage.

And the court does further find that said last-mentioned mortgage was duly recorded, and that the same is a valid lien upon the said railroad and property of said Cincinnati Northern Railway Co. next after the mortgage hereinbefore secondly described to secure the payment of the principal of such of the bonds in said mortgage mentioned as have been duly issued and disposed of by said Cincinnati Northern Railway Co.; but the court makes no finding as to how many, if any, of said bonds have been so issued or disposed of.

And the court does further find that on and prior to the 5th day of May, 1883, the Toledo, Cincinnati and St. Louis Railroad Co. was a corporation of the State of Ohio, Indiana, and Illinois by virtue of the consolidation of certain pre-existing railroad corporations, and that said Toledo, Cincinnati and St. Louis Railroad Co. at said time claimed to own and operate a railroad from the city of Toledo, in the State of Ohio, to the town of Delphos, in said State, and thence through the States of Indiana and Illinois to the city of East St. Louis, in said last-named State, and from the said town of Delphos to a connection with the said railroad of the Cincinnati Northern Railway Company at or near Dodds, in the county of Warren, in the State of Ohio, and that the said Toledo, Cincinnati and St. Louis Railroad Company and the said Cincinnati Northern Railway Co. and the said Spring Grove, Avondale and Cincinnati Railway Co., corporation- as aforesaid, did, on said 5th day of May, enter into an agreement with the said Toledo, Cincinnati and St. Louis Railroad Company whereby said three corporations became consolidated, under the laws of the State of Ohio, under and by the name of the Toledo, Cincinnati and St. Louis Railroad Co., and did unite the said lines of railroad at their said respective points of contact, and did thereby transfer and vest in said Toledo, Cincinnati and St. Louis Railroad Co., the defendant in this action, all the powers, privileges, immunities, and property, real, personal, and mixed, belonging to the said Cincinnati Northern Railway Co. or to said Spring Grove, Avondale and Cincinnati Railway Co., and hereinbefore described.

And the court does further find that by virtue of said cousolida-

tion the said defendant, The Toledo, Cincinnati and St. Louis Railroad Company, did undertake and assume to pay all the debts and liabilities, as the same might mature, of the said Cincinnati Northern Railway Company and of the said Spring Grove, Avondale and Cincinnati Railway Co.

And the court finds that said consolidation was subject and subordinate to the rights of the holders of the bonds secured by the said several mortgages and without prejudice to the right to sell the said property of the said Cincinnati Northern Railway Co. by virtue of said mortgage of October 1, 1880.

And the court does further find that the said Toledo, Cincinnati and St. Louis Railroad Co., defendant, is and was at the time the bill of complaint herein was filed utterly insolvent, and that it has failed to pay the interest which fell due October 1, 1882, April 1, 1883, and October 1, 1883, on the aforesaid bonds issued by the said Cincinnati Northern Railway Co. of date Oct. 1, 1880, or any part thereof, and the same has ever since then remained unpaid, although payment of the same has been duly demanded as hereinbefore found.

And the court does further find that by reason of said default of the said Cincinnati Northern Railway Co. and of the said Toledo, Cincinnati and St. Louis Railroad Co. to pay said interest the condition of said mortgage, hereinbefore first mentioned, made by said Cincinnati Northern Railway Co. to the complainant herein October 1, 1880, has been broken and said mortgage or deed of trust has become absolute, and the complainant herein is entitled to a decree for the sale of all the property and rights of said Cincinnati Northern Railway Co. included in said mortgage, and that in the event of said sale the principal of the aforesaid bonds, amounting to one million dollars, will, by virtue of the terms of said mortgage, become due and payable to the several holders thereof.

It is therefore considered, adjudged, and decreed that the said defendant, The Cincinnati Northern Railway Co., or the said defendant, The Toledo, Cincinnati and St. Louis Railroad Co., shall within ten days from this date pay into this court for the use and benefit of the holders of the unpaid coupons of said first-mortgage bonds of the said Cincinnati Northern Railway Company dated on said first day of October, 1880, the sum of ninety thousand dollars, with interest at the rate of six per cent. per annum from October 1, 1882, till paid on thirty thousand dollars, a part of said sum, and like interest from April 1, 1883, till date of payment upon thirty thousand dollars, a part of said sum, and like interest from October 1, 1883, till paid upon thirty thousand dollars, also a part of said sum, and also that within the same time it or the said The Toledo, Cincinnati and St. Louis Railroad Co. pay into this court the sum of fifty thousand dollars to be applied to the payment of the costs, charges, and expenses of the complainant herein in this behalf and to the payment of the indebtedness incurred by order of this court by William J. Craig as receiver of the said Cincinnati Northern railway.

And it is now here further considered, adjudged, and decreed that in default of such payment within said time by any defendant

herein or holder of bonds or coupons secured by either of the junior mortgages described in the bill of complaint herein all equity of redemption of the said defendant, The Cincinnati Northern Railway Co., and of the said Toledo, Cincinnati and St. Louis Railroad Co. and of all parties to this suit, including the holders of the bonds or coupons last mentioned, of, in, and to the said mortgaged premises, property, rights, assets, and franchises and every part and parcel thereof, described and embraced in said first mortgage made by said Cincinnati Northern Railway Co. on said 1st day of October, 1880, be, and the same is, forever barred and foreclosed, which said mortgaged premises, property, assets, rights, and franchises are hereinbefore and in said bill of complaint, to which reference is now had for that purpose, fully described, including all property embraced within the terms of said mortgage acquired by said Cincinnati Northern Railway Co. since the date thereof and owned by it at the time of the consolidation with the said Toledo, Cincinnati and St. Louis Railroad Co., and that in default of said payments or any of them all said mortgaged premises and property, real, personal, or mixed, rights and franchises, be sold upon proper order of sale to be issued herein in the manner and upon the terms hereinafter directed, provided, however, and it is hereby ordered, that nothing in this decree shall be construed as directing any sale to be made of any interest as lessee or otherwise which the said Cincinnati Northern Railway Co. may have acquired in or to the said Spring Grove, Avondale and Cincinnati railway or its property, rights, or franchises by virtue of that certain lease thereof made to said Cincinnati Northern Railway Co. by said Spring Grove, Avondale and Cincinnati Railway Co. on or about the 25th day of April, A. D. 1881, being the lease referred to in the bill of complaint herein, and it is hereby ordered that said leasehold interest be, and the same hereby is, excluded from the sale herein provided for, and that the purchaser at said sale shall acquire no interest whatever in said Spring Grove, Avondale and Cincinnati railway or property by virtue of said lease, and shall incur no obligation in regard thereto by reason of the same. Said property shall be sold by public auction at the front door of the court-house of this court, in the city of Cincinnati, county of Hamilton and State of Ohio, on the day to be named by the commissioner herein appointed in his advertisement of the sale, and previous notice of the time, place, and terms of said sale shall be given by publication, beginning not less than 60 days prior to the time of said sale and to be repeated weekly until the sale, in two daily newspapers of general circulation, one published in the city of Cincinnati, Ohio, and the other in the city of Boston, Mass., and the said commissioner making said sale shall accept no bid from any bidder who shall not first place in his hands or deposit with him as a pledge that he will make good his bid in case of its acceptance by the court the sum of fifty thousand dollars in money or said first-mortgage bonds of said Cincinnati Northern Railway Co. of October 1, 1880, to the amount of one hundred thousand dollars, exclusive of interest.

And it is further ordered that of the purchase price so bid not less

than the sum of fifty thousand dollars shall be paid in cash, and also such further portions of said purchase price shall be paid in case as this court may in this case from time to time direct in order to meet other claims which this court may adjudge in this case to be prior in equity to said first mortgage, the court reserving the right to resell in this case said premises and property upon failure to comply within twenty days with any order of the court in that regard, and the balance of said purchase price not required to be paid in cash may be paid either in cash or the purchaser at said sale shall have the right to satisfy his bid, in whole or in part, by paying over and surrendering said first-mortgage bonds of said Cincinnati Northern Railway Co. of the date of October 1, 1880, and overdue and unpaid coupons belonging thereto at such price or value as would be equivalent to the distributive amount that the holders thereof would be entitled to receive thereon in case the entire amount of the bid were paid in cash.

And it is further ordered that as to so much of said purchase price as is hereby required to be paid in cash the same shall be payable in cash or by the surrender of certificates of indebtedness issued by said Craig as receiver of and while operating said Cincinnati Northern railway under the orders of this court.

And it is further ordered that the fund to arise from said sale shall be applied as follows:

1. To the payment of the cost of this suit, and also the compensation to complainant herein for its services, charges, and expenses, including its counsel fees in the execution of said trust and all proper expenses of sale.

2. To the payment of any evidence of indebtedness of the said receiver herein issued by order of this court in the performance of his duties as such receiver in this cause, and to the payment of other claims which have been or which may be adjudged by the court to have priority over said first mortgage, and the said receiver is hereby required to transfer and convey to such purchaser or purchasers all property or rights which he may have acquired in the administration of said trust.

3. To the payment of said first-mortgage bonds of said Cincinnati Northern Railway Co. of date October 1st, 1880, and the past-due coupons to the same belonging, with interest accrued and to accrue to the holders thereof.

4. To the payment of the bonds of the Spring Grove, Avondale and Cincinnati Railway Co. and coupons, with interest accrued and to accrue to the holders thereof, being the same bonds and coupons secured by the second mortgage of said Cincinnati Northern Railway Co., dated the 25th day of May, 1881, being the same mortgage mentioned in the bill of complaint herein, a copy whereof is therewith filed as Exhibit B.

5. The surplus, if any, to be paid into this court, subject to its further orders in that respect; and Homer F. Jordan, Esq., is hereby designated and directed as a special master commissioner to make the sale hereby decreed and to convey the property to the purchaser thereof.

And it is further adjudged and decreed that the purchaser or purchasers of the property herein ordered to be sold shall be invested with and shall hold, possess, and enjoy the said mortgaged premises and property herein directed to be sold and all the rights, privileges, and franchises appertaining thereto as fully and completely as the said Cincinnati Northern Railway Co. or the said Toledo, Cincinnati & St. Louis Railroad Co., defendant, now holds or enjoys or is entitled to hold or enjoy the same.

And further that said purchaser or purchasers shall have and be entitled to hold the said railroad and property free and discharged from the lien or incumbrance of the said several mortgages in the bill of complaint in this case mentioned and from the claims of all parties in this suit, to wit:

1. The mortgage or deed of trust made by said Cincinnati Northern Railway Co. on the first day of October, 1880, to the complainant herein to secure the first-mortgage bonds of said railway company to the amount of one million of dollars.

2. That certain mortgage or deed of trust made by the said Cincinnati Northern Railway Co. on the 25th day of May, 1881, to the complainant herein to secure the payment of the bonds of the said Spring Grove, Avondale and Cincinnati Railway Co., purporting to be one million dollars.

3. That certain other mortgage or deed of trust made by the said Cincinnati Northern Railway Co. to the complainant herein on the 25th day of May, 1881, to secure the payment of one million of dollars of income bonds of the said Cincinnati Northern Railway Co.; and

4. All claims of the defendant, Granville D. Braman.

And this cause is now adjourned for further consideration.

JOHN BAXTER, *Judge, &c.*

* * * * * * *

(Record, p. 78 to p. 80, incl.)

And afterwards, to wit, on the 10th day of April, A. D. 1884, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal V, page 362.

This day this cause came on further to be heard upon the intervening petition of R. Suydam Grant, filed in this cause October 27th, 1883, and the court, being fully advised in the premises, does order, adjudge, and decree as follows, to wit:

The court finds that the two decrees herein made and entered upon said intervening petition on the 22nd day of December, A. D. 1883, were entered without notice to the complainant herein and without proof that the said decrees are erroneous and unjust to the bondholders for whom the said complainant herein is trustee; that said decrees are not authorized by the pleadings and are based upon a misrecital of the facts as evidenced by the record in this cause;

that said decrees were authorized by the court without examination in the erroneous belief entertained at the time that all the parties in interest had assented to said decrees, and that the parties adversely interested acquired no knowledge of the allowance of said decrees until about the 24th day of February, A. D. 1884, and after the adjournment of the term of court at which the same were entered.

And thereupon it is by the court of its own motion ordered, adjudged, and decreed that the said decrees be, and they are hereby, annulled, set aside, and held for naught.

And the court, coming now to determine the questions arising upon the said intervening petition of R. Suydam Grant, does order, adjudge, and decree as follows, to wit:

That the relief prayed for in said intervening petition be, and it is hereby, denied except as hereinafter provided.

And the court does further find that the said petitioner is entitled to fair compensation for the use of said rolling stock described in his said intervening petition by the receiver in this cause upon the railroad of The Cincinnati Northern Railway Co., def't herein.

And for any deterioration by reason of such use.

But the court defers the determination of the amount of such compensation until the coming in of the report thereon of the master appointed in this cause on the 5th day of April, A. D. 1884.

And the court does further find that the said petitioner is entitled to take and repossess himself of his said rolling stock wherever the same may be found in the possession of the receiver appointed in this cause or of the receiver appointed in causes numbered 3576, 3577, 3578, and 3579 in this court; and leave is hereby granted to said petitioner to apply at any time to this court for any additional orders that may be necessary in that behalf.

And the said R. Suydam Grant applied for leave to answer the petition of the complainant, The Central Trust Co., filed March 15, 1884, and to support his answer by affidavits or other proof, and the court, entertaining the opinion that the answer and affidavits proposed are by force of the foregoing decree rendered unnecessary, declines to grant the leave asked and refused to permit an answer to said petition for rehearing on affidavit or other proof in support thereof to be filed.

And thereupon the intervening petitioner, R. Suydam Grant, in open court prayed an appeal from the foregoing decree, which is disallowed by the court.

(Record, p. 297 to p. 299, incl.)

And afterwards, to wit, on the 27th day of June, A. D. 1885, the following report of special master commissioner was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Report of Special Master Commissioner.

Circuit Court of the United States, Western Division of the Southern District of Ohio.

THE CENTRAL TRUST CO. OF NEW YORK, a Corporation, Complainant,
vs.
THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY *et al.*, Defendants.

In pursuance of an order of said court in this case made March 29, 1884, and an order issued by the clerk of said court dated April 3, 1884, which is hereby returned and filed—

I caused the premises described in said order so issued to me to be advertised for sale in pursuance to the decree under which said order was issued, and in conformity with said order said property was advertised for sale to take place on the 28th day of July, 1884. On the morning of said day, by order of court, said sale was postponed and the same was not offered for sale.

Thereupon, in pursuance of said order and of a further order made by said court on the 17th day of April, 1885, and issued to me by the clerk of said court on the 20th day of April, 1885, and which is hereby returned and filed, I caused the premises described in said 1st order to be advertised for sale, said sale to take place on the 27th day of June, 1885, at 11 o'clock a. m.

Said advertisements were placed in the Boston Daily Globe, a newspaper printed and of general circulation in Boston, Suffolk county, Mass., and the surrounding States.

Also in the Cincinnati Commercial Gazette, a newspaper printed in Cincinnati, Hamilton Co., Ohio, and of general circulation in Cincinnati, and also in the surrounding States and in said county.

Said advertisements were first placed in said newspapers on the 24th day of April, 1885, and continued each week on same day of week for ten consecutive weeks, making a lapse of time of more than 60 days prior to the day of sale, to wit, June 27, 1885, as in the order directed.

Thereupon, on said June 27th, 1885, at 11 o'clock a. m., at public sale, at the front door of the United States court-house, in the city of Cincinnati and State of Ohio, which time and place were set forth in said advertisements in said newspapers, I offered said premises described in said order for sale to the highest bidder and sold the same to the following-named parties, to wit, J. N. Kinney, A. S. Winslow, W. W. Bailey, Jos. W. Wilshire, and J. M. W. Neff, for the sum of two hundred thousand dollars ($200,000), which was the highest and best bid for said property.

Thereupon said purchasers produced to and delivered to me a certificate of deposit of the Safe Deposit Co. of Cincinnati for one hundred thousand dollars ($100,000) of the bonds of said company

of the issue of October 1st, 1880, being the 1st-mortgage bonds of said company.

Thereupon I struck off the said Cincinnati Northern railway and all other property described in said 1st order to said purchasers, and they became the purchasers thereof. Thereupon I delivered said certificate of deposit to the clerk of said court.

HOMER F. JORDAN,
Special Master Commissioner.

June 27, 1885.

I report also the following costs:

Cincinnati Commercial Gazette	$320
The Boston Daily Globe	160

The former account with the Boston Daily Globe has been settled by Mr. Geo. Hafer, receiver, by note given F. T. McFadden, agent of Globe. The amount is unknown to me.

HOMER F. JORDAN,
Special Master Commissioner.

(Record, p. 300 to 304, incl.)

And afterwards, to wit, on the 9th day of July, A. D. 1885, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal W, p. 153.

Now, this day, this cause came on further to be heard upon the application of the complainant herein, The Central Trust Co. of New York, to confirm the sale made herein on the 27th day of June, 1885, by Homer F. Jordan, Esq., special master commissioner appointed for that purpose by the former order of this court; and upon producing the report of said special master commissioner of said sale, and it appearing that notice of the hearing of said application for the confirmation of said sale has been given in accordance with the former order of this court in that behalf, and the court having fully examined the report of said special master commissioner of said sale and his doings in pursuance of the decree of sale heretofore entered herein, and finding the same correct and in all respects in conformity to law and to the former orders of this court, and that the amount bid at a said sale, as reported by said special master commissioner in his said report of said sale, to wit, the sum of two hundred thousand dollars, *and* was the highest and best bid for the premises and property, rights and franchises, so ordered to be sold by him at said time—

It is now, therefore, ordered, adjudged, and decreed that said sale be, and the same hereby is, ratified and confirmed, and all the proceedings of said special master commissioner in that regard are hereby approved and confirmed.

And it is further ordered and directed that upon the entering of this decree the said purchasers at said sale pay into this court the

sum of fifty thousand dollars, being the amount ordered by this court in the decree of sale hereinbefore entered to be paid in cash at this time; and thereupon the said Homer F. Jordan, as master commissioner, shall deliver to said purchasers the bonds of the said Cincinnati Northern Railway Co. of date October 1st, 1880, placed in his hands by said purchasers as a pledge that they would make good their said bid in case the same should be accepted by the court in this cause, or the certificate of deposit of the Safe Deposit Company of Cincinnati for said bonds, which was accepted by said master in lieu of said bonds, as stated in his said report of sale; and upon such payment being made the said Homer F. Jordan, Esq., as special master herein, shall by proper instrument in writing convey in fee simple to said purchasers, namely, J. N. Kinney, A. S. Winslow, W. W. Bailey, Joseph W. Wilshire, and J. M. W. Neff, all and singular the premises and property, rights and franchises, of The Cincinnati Northern Railway Company, defendant herein, as the same are heretofore described in said decree of sale heretofore entered herein, and all the right, title, and interest, at law or in equity, of all the parties to this cause in or to the same or any part thereof; and the said purchasers are hereby subrogated to all the rights of all lienholders, parties to this suit, in or to said premises or property, rights and franchises, including any rights of any of the parties to this suit.

And it is further ordered, adjudged, and decreed that upon the execution and delivery of said deed all parties to this cause and the receiver heretofore appointed herein, George Hafer, Esq., shall, and they are hereby directed and required to, surrender and deliver possession of all and singular the premises and property, rights and franchises, aforesaid so sold as aforesaid to the said purchasers of their assigns; and, further, that said receiver shall thereupon file herein his final report of his doings as receiver in this cause.

And it is further hereby ordered, adjudged, and decreed that this decree of confirmation of the sale of the premises and property, rights and franchises, aforesaid be subject to the terms and provisions of the decree of sale heretofore entered in this cause, whereby it is provided that of the purchase price so bid at said sale such further portions thereof, in addition to the said sum of fifty thousand dollars heretofore mentioned, shall be paid in cash as this court might from time to time in this case direct, in order to meet other claims which this court has or hereafter may adjudge in this case to be prior in equity to said first mortgage, and whereby this court did reserve the right to resell in this cause said premises and property, rights and franchises, upon the failure to comply within twenty days with any order of this court in that regard; and the right, title, and interest of the said purchasers in and to the premises and property, rights and franchises, aforesaid by virtue of the said sale and of this confirmation thereof and of the deed to be made in pursuance hereof shall be deemed to be acquired subject to said provision.

And it is now further ordered that out of the sum of fifty thousand dollars hereby ordered to be paid into court upon the entering of this decree there be paid by the clerk as follows:

1. The costs of this cause by him to be taxed, amounting to ——

dollars, which shall include the costs of advertising as set forth in the report of Homer F. Jordan, Esq., the special master commissioner herein.

2. To said Homer F. Jordan, special master commissioner, for his compensation for executing the order of sale herein, the sum of three hundred and fifty dollars.

3. To Messrs. Butler, Stillman & Hubbard and to Messrs. Hoadly, Johnson and Colston, as counsel for the complainant herein, for their compensation as such counsel of the trustee, the sum of five thousand dollars.

And proper receipts for all said payments shall be taken and filed by the clerk in this cause.

And this cause is now adjourned for the further consideration of the court.

* * * * * * *

(Record, p. 341.)

And afterwards, to wit, on the 8th day of February, A. D. 1887, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal X, p. 42.

This day came the said petitioner, and under leave of court filed his petition herein, and thereupon, on the motion of the said petitioner, by Bluford Wilson, his solicitor, it is ordered by the court that the said complainant and the purchasers of the said railroad property at the foreclosure sale thereof, heretofore made, appear before this court on Tuesday, the 5th day of April, 1877, at 11 o'clock a. m., and show cause, if any they have or know, why the relief prayed by the said petitioner should not be granted.

(Record, p. 342 to p. 375, incl.)

And afterwards, to wit, on the 8th day of February, A. D. 1887, the following intervening petition of R. S. Grant was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Intervening Petition of R. S. Grant.

In the United States Circuit Court, Southern District of Ohio, Western Division.

THE CENTRAL TRUST CO. OF NEW YORK, Complainant, *against* THE TOLEDO, CINCINNATI AND ST. LOUIS Railroad Co., The Cincinnati Northern Railroad Co., and Granville D. Braman, Respondents.	}	In Chancery. #3554, 3576, 3577, 3578, and 3579.

In the matter of the intervening petition of R. S. Grant.

To the honorable the judges of the circuit court of the United States for the southern district of Ohio (western division):

Your petitioner, R. S. Grant, respectfully shows unto this honorable court as follows:

I. That on March 24, 1883, your petitioner, R. S. Grant, and the Toledo, Cincinnati and St. Louis Railroad Company entered into a contract for the conditional sale or lease to the said railroad company of ten locomotives of the value and agreed price of or aggregate rental $90,558.97, of which $18,558.97 was paid in cash and the remaining $72,000 was payable in monthly installments of from $1,300 to $1,500 each, together with six per cent. interest, taxes, and insurance premiums, the final payment becoming due April 10, 1888, the railroad company, as vendee and lessee, being bound to keep the locomotives fully repaired.

II. That the said locomotives were duly delivered by your petitioner to the said railroad Co. and were used by it in the operation of its railroad up to August 1st, 1883.

The three monthly installments for May, June, and July, 1883, were paid under this contract.

III. That on August 1, 1883, one G. D. Braman, a judgment creditor of the said railroad Co., filed a creditor's bill in the United States circuit court for the district of Illinois, in the seventh circuit, praying, among other things, for the appointment of a receiver of the property of said railroad company and alleging that the public interests and the interest of all the owners and creditors of the said company would greatly suffer should its line of railroad cease to be operated, and that the same could not be operated without the continued use thereon of the aforesaid ten locomotives, which the complainant stated he was informed and believed were likely to be withdrawn if overdue payments thereon were not soon made; that to this bill the Central Trust Co. of New York, complainant herein, as trustee of the mortgage creditors of said railroad, voluntarily entered its appearance, and it acquiesced in the appointment of the receiver thereunder in accordance with the prayer of the bill.

That thereupon Edwin D. Dwight was appointed receiver by the

United States circuit court in the States of Illinois and Indiana of the property of the Toledo, Cincinnati and St. Louis Railroad Company in those States, and on Aug. 2, 1883, under ancillary proceedings in the United States circuit courts in Ohio, the said Dwight was also appointed receiver of all the property of the said railroad Co. in the State of Ohio.

That in the orders appointing the said receiver it was, among other things, provided that the receiver should take possession and operate the said railroad and premises described in said bill of complaint, and should pay all debts for wages, materials, and supplies incurred in the operation and maintainance of the said property during the six months then last past.

That Dwight as receiver entered into possession of all the property in the three States named, and thus took possession of the said 10 locomotives, the subject of the conditional sales and leases before mentioned, and thereafter used the said locomotives in the operation of the railroad property.

IV. That default was made on August 10, 1883, in the payment of the installment or rental of $1,500 and interest, then due under the said contract with your petitioner, R. S. Grant, and thereupon, under the terms of the said contract, your petitioner became entitled to reclaim the locomotives sold or leased by him.

V. That on or about August 18, 1883, demand was made by your petitioner upon Dwight, as receiver as aforesaid, for the surrender of the said locomotives, but the said Dwight, as receiver, refused to surrender the same, but as such receiver then promised the agent of your petitioner that if the said locomotives were left with him he would purchase and pay for them at a valuation equal to the amount of the installments or rentals remaining unpaid under the said contract.

VI. That on August 25, 1883, your petitioner presented a petition to the United States circuit court in Illinois, praying for an order directing Dwight, as receiver, to surrender the said 10 locomotives or for other relief in accordance with the agreement of the said receiver before alleged; that formal action upon this petition was postponed owing to a conflict of jurisdiction which had arisen between the judges of the 6th and 7th circuit as to some of the property in the hands of the receiver, but that on or about Sep. 18, 1883, the said Dwight, as receiver, after taking instructions directly from the court which had appointed him, fully ratified and completed the agreement of purchase above alleged and contracted as such receiver to take the said locomotives and to pay therefor to your petitioner the full contract price, with interest and without discount.

VII. That on October 20, 1883, by an order made in the above-entitled foreclosure suit, instituted by the Central Trust Co. of New York against the said railroad Co., the said Dwight was removed as receiver of the property of the railroad company in the State of Ohio, and William J. Craig was made receiver thereof in the place and stead of the said Dwight, and subsequently the said Craig was likewise made receiver of the said property in Illinois and Indiana in the place and stead of the said Dwight, and that it was further

ordered in the U. S. circuit court for the district of —— that the receivership already existing under the order theretofore entered in the Braman suit should be extended over and made to apply to the premises and property sought to be foreclosed.

That the said Craig entered into possession of the said property as receiver on November 1, 1883, and thus took possession of the said locomotives and thereafter used the same in the operation of the railroad property.

That the said locomotives had been by the receiver distributed to different divisions of the said railroad, with the result that one, # 73, was in use upon the Cincinnati Northern railway, and three, # 67, 68, and 72, upon the Dayton and Southeastern Division, and the remaining six on the main line of the said Toledo, Cincinnati and St. Louis railway between Toledo and St. Louis.

VIII. That in October, 1883, your petitioner presented his intervening petition in the cause, praying for a surrender of the locomotives or for other relief, and thereupon a rule was granted directing the receiver to answer, and that an answer was subsequently filed by the receiver, admitting the contract aforesaid, the receiver's possession of the locomotives, and alleging that the same was necessary to the successful operation by him of the said railroad, and praying the court to make such order as would enable him to retain the possession and use of the said locomotives.

IX. That in and by the petition last aforesaid and the answer thereto and the other proceedings in the cause it then appeared that the said railway Co., although it had never paid its bonded interest, had yet been allowed by the mortgage bondholders and their trustees to remain in the possession and management of the railroad property; that the appointment of the said Dwight as receiver, although made at the suit of the said Braman as judgment creditor, was in fact a collusive proceeding procured in the interest of the mortgage bondholders and acquiesced in by their trustee; that the said Dwight, as receiver, had taken possession of the petitioner's property in the same interest, and, notwithstanding the default in the agreements for the conditional sale and lease thereof, had refused to surrender possession thereof when demanded by your petitioner, upon the ground that his retention thereof was essential and necessary to the operation of the railroad property; that the appointment of the said Craig as receiver in the place and stead of the said Dwight was made upon the motion of the said mortgage trustees and at their suit, and that upon a like demand for the return of your petitioner's locomotives the said Craig refused to surrender the same, for the reason that the same were necessary to the operation of the said railroad; that repeated applications have been made on behalf of your petitioner, both to the receivers and also to the courts appointing the same, for the return of the locomotives or for the payment of the purchase price thereof; that the said receivers had always insisted that the retention of the said locomotives was essential to the operation of the railroad property, and they retained possession and use of said locomotives in the interest of the mortgage bondholders and against the will and demand of your peti-

tioner; that the said receivers never claimed any right to retain the said locomotives except upon condition of ultimate full payment to your petitioner of their value; that the said receiver Dwight had in terms agreed, as receiver, to purchase the said locomotives and to pay the full contract price thereof, together with interest and without discount; that the said receiver Craig, in his answer aforesaid, admitted the facts stated by your petitioner, and prayed the court to make such order as would enable him to retain possession and use of said locomotives and at the same time fully protect the right of your petitioner; that the said Craig, as receiver, afterwards, on Dec. 17, 1883, agreed to the valuation fixed in the contracts, and by his counsel consented to the entry of the decrees securing to your petitioner the payment of the same, with interest, and that it had been announced by the judge presiding in this court on Nov. 23, 1883, in open court and in the presence of the solicitor of the mortgage trustees, who made no objection to the same, that your petitioner's locomotives aforesaid should be paid for either by the issue of receiver's certificates or in any speedier way practicable.

X. That on Dec. 22, 1883, decrees were entered herein in the matter of the said intervening petition ordering, adjudging, and decreeing that the receiver pay to your petitioner, as rentals and in full for all claims for rentals, interest, and repairs, and for purchase-money due upon the said locomotives # 67, 68, 72, and 73, the aggregate sum of thirty-three thousand and one hundred and sixty-one $\frac{89}{100}$ ($33,161.89) dollars, and apportioning such payments between the separate divisions of the said railroads according to the distribution of the said four locomotives.

Copies of the said decrees are hereto annexed, marked Schedules "E" and "F." The said decrees were entered with the consent of the receiver's solicitors and with the knowledge of the solicitors of the Central Trust Company, complainant in the principal cause.

XI. That the February term of this court for the year 1884 passed without further action herein in the matter of the said invening petition.

XII. That by orders directed to be entered herein by Judge Baxter, of his own motion, on the 10th day of April, 1884, in the April term of this court for the year 1884, copies of which orders are hereto annexed, marked Schedule "G," it was directed that the said decrees, Schedules E and F, should be vacated.

That the said order, Schedule G, was based upon a mistake of *of* the facts as presented by the record in this cause, and your petitioner insists that notwithstanding the recitals in the said order, Schedule G, the said decrees, Schedules E and F, were entered after an understanding with and notice, both actual and constructive, to the solicitor of the complainant, the mortgage trustee; and, further, that they were abundantly sustained by the sworn answer of the receiver, by the correspondence of record, and by the uncontradicted facts of the decrees; that they were entered with the written consent and approval of the receiver; that they were in accordance with the contracts and agreements made both with the company and with the

receivers under the actual or implied assent of the mortgage bondholders; that they are authorized by the pleadings and correctly recited the facts thereof; that they were presented to the court nearly two weeks prior to their entry, and that the solicitors for the receiver and the complainant, the mortgage trustee, had notice thereof and opportunity to examine and correct the same; that they followed the views which had been expressed by the court in the presence of one of the solicitors for the complainant, the mortgage trustee, without objection upon his part; that after entry they were brought to the notice of all the parties to the cause and remained without objection for more than a reasonable time, and that the said decrees were under the circumstances entirely fair and just to the mortgage bondholders represented by the complainant, trustee, and to all interested in the cause.

XIII. That your petitioner is advised and believes that the said order, Schedule G, entered herein on the 10th day of April, 1884, purporting to vacate the decrees entered on the 22nd day of Dec., 1883, were not only based upon an erroneous view of the facts, but, moreover, were beyond the power of the court to make, and were of no effect and void, and your petitioner has at all times protested against the same.

Not only was the said order, Schedule G, entered by the court of it own motion at the said April term and after the expiration of the October term of 1883, at which the decrees, Schedules E and F, were entered, and also after the intervention and expiration of the February term of this court for the year 1884; that, moreover, the said order, Schedule G, was entered without proof, without change in petition of your petitioner or of the receiver's answer thereto, or without other change in the pleadings in the cause and with the record standing unchanged from its position on Dec. 22, 1883, when the said decrees, Schedules E and F, were entered.

XIV. That by virtue of an order made herein April 5, 1884, it was referred to Hon. Jacob D. Cox, as master, directing him to ascertain the amount of the leased equipment upon the said railroad, the use made of the same, the necessity for its continued use, and what would be a fair and just compensation for the past and future use thereof, and also what, if any, deterioration the said equipment had suffered since it came to the hands of the receiver; that your petitioner, although protesting in writing that the said order and the proceedings thereon should not affect his claim herein, did, thus protesting, attend before the said master and make proof as to the use made by the receiver of said ten locomotives and as to their value and condition.

That the said master made a report unto this court as to all the matters referred to him, and therein reported that the said ten locomotives had been used by the said receivers, and that their continued use was necessary in the operation of the property; that the said master further reported that there should be allowed and paid to your petitioner for the said four locomotives the sum of $160 per month rental from the 1st day of August, 1883, and reporting also the rent due for the six months prior to said date at same rate, with

an allowance for damages, and no more, instead of the sum of $33,161.89, which this court had on December 22, 1883, decreed should be allowed and paid to your petitioner for the said locomotives.

That your petitioner duly protested against any confirmation of the report of the said master so far as the same affected his claim, but your petitioner is informed and believes that on the 12th day of November, 1885, an order was entered confirming the said report generally, but reducing the monthly rental to $115 per month and disallowing all rentals and repairs prior to Nov. 1, 1883, copy of which order is hereunto annexed, marked Schedule "D;" that your petitioner is, however, advised and believes that the entry of said order was without effect upon your petitioner's claim herein, the same having been adjudicated by the said decrees entered on Dec. 22, 1883, and the said decrees never having been effectively vacated or altered.

XV. That the said four locomotives at all times subsequent to the appointment of the receivers aforesaid and until the sale of the said railway property and its transfer to the purchasers thereof, Jul- 22, 1884, remained in the possession and use of the said receivers and formed an essential part of the equipment employed by the receivers in the operation of the said railroad.

That no sum of money whatever has ever been paid to your petition- by either the said receivers for such use of the said locomotives or by way of compensation for the deterioration suffered by the said locomotives during such use.

That the said locomotives suffered very serious deterioration in the said use; that the proper and usual repairs were not made to the same, so that the said locomotives were on said 22 day of July, 1884, by reason of said deterioration and want of repair alone, of very much less value than they were when the return thereof was demanded by your petitioner from the said receivers.

That the market value of locomotives of the class to which the said ten locomotives belong very seriously depreciated since your petitioner demanded from the receivers the return thereof and prior to July 22, 1884, and that your petitioner could not at said last-named date obtain for the said locomotives, had they been in good order, more than thirty per cent. of the sum of money which your petitioner could have obtained therefor had the receivers returned the said locomotives to *it* upon *its* demand.

That about July 22, 1884, the said four engines were transferred by the receiver to the "main line" and were by him continued in use thereon with the remaining six locomotives of the aforesaid ten locomotives until May 1, 1885, when the successor of the said receiver discontinued their use, and they were stored on a switch of the said railroad.

XVI. That your petitioner is advised and believes that *it* is entitled to be paid and allowed the sums so decreed to be paid and allowed to *it* by the said decrees entered December 22, 1883, and that the same should be ordered paid to your petitioner out of the net income, if any there be, of the receivership, and in default thereof

then out of the proceeds of the sale of the *corpus* of the railroad property.

Wherefore your petitioner prays that it may be ordered and decreed that the said decrees entered herein on the 22nd day of Dec., 1883, are still valid and effectual decrees adjudicating finally the said rights of your petitioner herein, and that the orders entered herein on the 10th day of April, 1884, purporting to vacate the said decrees and the order entered herein on the 5th day of April, 1884, so far as the same can be considered to refer to a master the matters of your petitioner's claim, and any order herein confirming any report of the said master may and each of the same may be ordered and decreed to be without effect upon the rights of your petitioner, and that it be ordered and decreed that your petitioner shall be paid and allowed for *its* said equipment the sum of $33,161.89, together with interest from the said 22nd day of Dec., 1883, to be paid out of the net income of the receivership, if any, so far as the same shall suffice, and that it be further ordered, adjudged, and decreed that any balance of your petitioner's said claim so ascertained not so paid shall be paid out of the proceeds of the sale of the mortgaged property in the principal cause herein, or that such other or further relief may be given your petitioner as to your honors may seem meet in the premises; and your petitioner will ever pray.

R. S. GRANT, *Petitioner.*

BLUFORD WILSON, *Solicitor.*

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

R. S. Grant, being duly sworn, on his oath deposes and says that he is the petitioner above named; that the facts set forth in the foregoing petition so far as they purport to be stated as of his own knowledge are true, and so far as they purport to be stated upon information and belief he believes to be true.

R. S. GRANT.

Subscribed and sworn to before me this 5th day of Feb., 1887.

CARSTEN WENDT, [SEAL.]
Notary Public in and for Kings County.

Cert. filed in New York Co.

SCHEDULE D.

THE UNITED STATES OF AMERICA, *Western Division of the Southern District of Ohio,* } *ss:*

At a stated term of the circuit court of the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of Oct., being also the sixth day of that month, in the year of our Lord one thou-

sand eight hundred and eighty-five, and of the Independence of the United States of America the one hundred and 10th—present, the Hon. George R. Sage, district judge, and Hon. John Baxter, circuit judge—on Saturday, the 14 day of Nov., 1885, among the proceedings had were the following, to wit:

THE CENTRAL TRUST CO. OF NEW YORK *against* THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD Co. *et al.*	In Chancery. #3578.

At Cincinnati, in said district, on the 12th day of November, A. D. 1885.

Present: Hon. John Baxter and Hon. Geo. R. Sage, judges.

This cause coming on this day to be heard upon the report of Jacob D. Cox, special master herein, filed June 26th, 1884, and upon the several exceptions of the several parties in interest to the said report, and upon the testimony, exhibits, and proof accompanying the said report, and thereupon the court having heard the argument of counsel for the respective parties in interest and being now fully advised in the premises—

The court doth order, adjudge, and decree that the various owners of cars and locomotives embraced in the petitions of intervention and in the report of said Jacob D. Cox, special master, do have and recover for the use of their respective cars and locomotives at the rates hereinafter specified from the time William J. Craig, as receiver in this cause, took possession as receiver of the property sold, namely, Nov. 1, 1883, to the 22nd day of July, 1884, at the following rates, namely:

For locomotives, at the rate of	$115 00	per month
For passenger cars, at the rate of	36 00	" "
For baggage, express, and caboose cars, at the rate of	18 00	" "
For box cars, at the rate of	5 00	" "
For stock cars, at the rate of	8 00	" "
For coal cars, at the rate of	4 50	" "
For gondolas, at the rate of	4 50	" "
For flat cars, at the rate of	3 50	" "

The court doth further order, adjudge, and decree that the special master hereinafter designated do take and consider all the testimony and exhibits taken before Jacob D. Cox, special master, and before J. E. Rogers, special master, heretofore appointed by the United States circuit court for the district of Indiana, on Dec. 1st, 1884, concerning the amount due to the owners of such cars and locomotives for repairs thereon, and that he report to the court therefrom his conclusions as to the amount which should be allowed for such repairs during the receivership of the said William J. Craig.

The court doth further order, adjudge, and decree that all such rentals and repairs are a prior and paramount lien, to be paid out of the proceeds of the foreclosure sale of the mortgaged premises prior

to any distribution of such proceeds among the holders of the bonds secured by said mortgage.

The court doth further order, adjudge, and decree that the claims of the owners of all such cars and locomotives for rental for the use of the same and for repairs for the period of six months prior to the appointment of E. E. Dwight as receiver, namely, August 1, 1883, be, and the same are hereby, disallowed; and the court doth further order that the claims of the said owners of cars and locomotives for rental for the use of the same and for repairs for the three months covered by the receivership of said E. E. Dwight, to wit, from the 1st day of August to the first day of November, 1883, be, and the same are hereby, disallowed.

The court doth further order, adjudge, and decree that the owners of such cars as have been destroyed while in use upon said railway between the said first day of Nov., 1883, and July 22, 1884, *to* have and recover the full value thereof and at the time of such destruction, to be determined by reference to a master, as hereinafter provided, and that the same is a prior and paramount lien, to be paid out of the proceeds of the foreclosure sale of the mortgaged premises prior to any distribution of such proceeds among the holders of the bonds secured by said mortgage.

The court doth further order, adjudge, and decree that the rentals and repairs due for all the cars and of locomotives in use by the receiver from November 1, 1883, to July 22, 1884 (being the date — the surrender by said receiver of the property in his custody as receiver herein), be apportioned among and paid by the several divisions upon the percentages reported by the said Jacob D. Cox, special master, as set forth in his report, as follows, namely :

Divisions.	Per cent.
Toledo Terminal	.40
Toledo Division	23.79
Dayton Division	12.98
Dayton and Southeastern Division	32.67
Iron Railroad Division	1.98
Cincinnati Division	1.36
Cincinnati Northern Division	4.16
St. Louis Division	22.66

The court doth further order, adjudge, and decree that this cause be, and the same is hereby, referred to William P. Fishback, as special master, to report to the court, in accordance with the provisions hereof, the amount due to each petitioner or owners of cars and locomotives for rentals and repairs, as well as for such cars as have been destroyed while in use by said receiver, and that said master shall report the amount of rental due to David B. Paul, trustee, for the use by said receiver of fifty sets of trucks described in the petition of the said David B. Paul, trustee.

As to all exceptions to the report of Jacob D. Cox, special master, which are inconsistent herewith it is ordered that the same be, and they are hereby, overruled, and in other respects such exceptions are hereby sustained.

From which order and decree the petitioners, R. S. Grant, the Grant Locomotive Works, and the American Loan and Trust Company, trustee; E. B. Phillips, trustee; the American Loan and Trust Co., trustee; the United States Rolling Stock Company—David B. Paul, trustee; Pennock Bros.; Clark, Post and Martin, and George William Ballou, trustee, respectfully pray, each for himself, an appeal, which is allowed to each respectively upon giving a bond, with sufficient surety, in the penal sum of five hundred dollars.

It is further ordered that the said special master do take proof and report to the court the amounts which should be allowed to the owners of such cars and locomotives as rental for the use of the same by George Hafer, as receiver of the Cincinnati Northern railroad, during such period as they may have been used by him, as well as the value of such cars and locomotives as may have been destroyed while used by said Hafer as such receiver.

JOHN BAXTER, *Judge, &c.*

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } ss:

I, B. R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is truly taken and correctly copied from the journal of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 24 day of Jan'y, A. D. 1887.

B. R. COWEN, *Clerk,*
[SEAL.] By R. C. GEORGI, *Deputy.*

SCHEDULE E.

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } ss:

At a stated term of the circuit court of the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of Oct., being also the 2nd day of that month, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and 7th—present, the Hon. George R. Sage, district judge—on Sat., the 22 day of Dec., 1883, among the proceedings had were the following, to wit:

THE CENTRAL TRUST CO. OF NEW YORK
against
THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD Co. *et al.* (Dayton & Southeastern Division) *et al.*
} In Chancery. # 3554.

In the matter of the intervening petition of R. S. Grant.

The said cause came on to be heard upon the petition and the

answer of the receiver thereto and upon the evidence submitted on behalf of said petitioner.

And it appearing to the satisfaction of the court that the receiver has in his possession Grant locomotives # 67, 68, and 72, with their tenders, and is using the same in the operation of the said Southeastern Division of the said defendant company's railroad between Dayton and Wellston, Ohio, and that the said locomotives are three of the ten covered by the said agreement of lease set out in said petition, and were acquired by said railway company under the terms of said agreement, and were so held at the date of the appointment of the receiver herein;

And it further appearing that the present receiver or his predecessor took the said locomotives into his possession as such receiver on the first day of August last, and has had the same in continuous use and possession since that date without having made any of the payments of rentals as provided in said indenture of lease or other compensation for the use thereof;

And it further appearing that the said locomotives are, in the judgment of the receiver, necessary to the proper operation of the said railway and should be acquired as part of its permanent equipment, and that the value of said locomotives and tenders as fixed in said indenture of lease is reasonable, and that the petitioner, R. S. Grant, the owner of said locomotives and tenders, is willing, upon the receipt of the contract price or upon being adequately secured therein, to transfer the title of the same to the receiver;

And the matter being fully heard by the court, and upon due deliberation thereon it is ordered, adjudged, and decreed that the receiver pay to the said petitioner, as rental for said locomotives and in full for all claims for rentals, interest, and repairs down to the first day of December, 1883, the sum of $2,311.41, the same being the amount due to said date under the terms of said lease, and the further sum of $22,560, balance in full as purchase-money for said locomotives and tenders.

And it is further ordered that the receiver pay said several amounts, as part of the operating expenses of the said Southeastern Div., out of any money not appropriated for the payment of current labor, supplies, and taxes.

And it is further ordered and decreed that the said several amounts, with interest thereon, at the rate of six per cent., from the first day of December, 1883, shall be a charge upon the earnings, income, and all the property of the said Toledo, Cincinnati and St. Louis Railway Company, and especially of the said division, prior to the first mortgage or other bonded debt of said railroad or said division thereof, and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of said railroad or said division shall be a first lien thereon and the said sale shall be made subject thereto.

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } ss:

I, B. R. Cowen, clerk of the circuit court of the United States within

and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 22 day of Jan'y, A. D. 1887.

B. R. COWEN, *Clerk*,
[SEAL.] By R. C. GEORGI, *Deputy*.

SCHEDULE F.

THE UNITED STATES OF AMERICA, }
Western Division of the Southern District of Ohio, } *ss:*

At a stated term of the circuit court of the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, on the first Tuesday of Oct., being also the 2nd of that month, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and 7—present, the Hon. Geo. R. Sage, district judge—on Saturday, the 22 day of Dec., 1883, among the proceedings had *had* were the following, to wit:

THE CENTRAL TRUST COMPANY OF NEW YORK
against
THE TOLEDO, CINCINNATI AND ST. LOUIS R. R. CO. and THE CINCINNATI NORTHERN R'Y CO. *et al.* } In Chancery. # 3554.

In the matter of the intervening petition of R. S. Grant.

This said cause came on to be heard upon the petition and the answer of the receiver thereto and upon the evidence submitted on behalf of said petitioner.

And it appearing to the satisfaction of the court that the receiver has in his possession Grant locomotive # 73 and is using the same in the operation of the said Cincinnati Northern Railway Co. between Cincinnati and Dayton, Ohio, and that the said locomotive is one of the ten covered by the agreement of lease set out in said petition, and was acquired by said railway company under the terms of said agreement, and was so held at the date of the appointment of the receiver herein;

And it further appearing that the present receiver or his predecessor took the said locomotive, with its tender, into his possession as *as* such receiver on the 1st day of August last, and has had the same in continuous use and possession since that date without having made any of the monthly payments of rental, as provided in said indenture of lease, or other compensation for the use thereof;

And it further appearing that the said locomotive is, in the judgment of the receiver, necessary to the proper operation of said railway and should be acquired as part of its permanent equipment, and that the value of said locomotive as fixed in said agreement of

lease is reasonable, and that the petitioner, R. S. Grant, the owner of said locomotive and tender, is willing, upon the receipt of the contract price or upon being adequately secured therein, to transfer the title of the same to the receiver;

And the matter being fully heard by the court, and upon due deliberation thereon, it is hereby ordered, adjudged, and decreed that the receiver pay to the said petitioner, as rental for said locomotive and tender and in full for all claims for rental, interest, and repairs down to the first day of December, 1883, the sum of $770.48, the same being the amount due to said date under the terms of said lease.

And the further sum of $7,520, balance in full as purchase-money for said locomotive and tender.

And it is further ordered that the receiver pay said several amounts, as part of the operating expenses of the said railway, out of any money not appropriated for the payment of current labor, supplies, and taxes.

And it is further ordered and decreed that the said several amounts, with interest thereon, at the rate of six per cent., from the 1st day of Dec., 1883, shall be a charge upon the earnings, income, and all the property of the said Toledo, Cincinnati and St. Louis Railroad Co., and especially of the said Cincinnati Northern Railway Co., as ahead of the first mortgage or other bonded debt of said company or either of them, and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of the said railway shall be a first lien and the said sale shall be made subject thereto.

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } *ss:*

I, B. R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 22nd day of January, A. D. 1887.

B. R. COWEN, *Clerk,*
[SEAL.] By R. C. GEORGI, *Deputy.*

SCHEDULE G.

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } *ss:*

At a stated term of the circuit court of the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, on the first Tuesday of April, being also the first of that month, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States of America

the one hundred and eighth—present, the Hon. Geo. R. Sage, district judge, and Hon. John Baxter, circuit judge—on Tuesday, the 10th day of April, 1884, among the proceedings had were the following, to wit:

THE CENTRAL TRUST COMPANY OF NEW YORK
against
THE TOLEDO, CINCINNATI AND ST. LOUIS R. R. Co.,
THE CINCINNATI NORTHERN R'Y Co., *et al.*
} In Chancery.

This day this cause came on further to be heard upon the intervening petition of R. Suydam Grant, filed in this cause October 27, 1883, and the court, being fully advised in the premises, does order, adjudge, and decree as follows, to wit:

The court finds that the two decrees herein made and entered upon said intervening petition on the 22nd day of Dec., A. D. 1883, were entered without notice to the complainant herein and without proof; that the said decrees are erroneous and unjust to the bondholders for whom said complainant is trustee; that *that* said decrees are not authorized by the pleadings, and are based upon a misrecital of the facts, as evidenced by the record of this cause.

That said decrees were authorized by the court without examination, in the erroneous belief, entertained at the time, that all the parties in interest had assented to said decrees, and that the parties adversely interested acquired no knowledge of the allowance of said decrees until about the 24th day of February, A. D. 1884, and after the adjournment of the term of court at which the same were entered.

And thereupon it is by the court, of its own motion, ordered, adjudged, and decreed that the said decrees be, and they are hereby, annulled, set aside, and held for naught.

And the court, coming now to determine the question arising upon the said intervening petition of R. Suydam Grant, does order, adjudge, and decree as follows, to wit:

That the relief prayed for in the said intervening petition be, and it is hereby, denied except as hereinafter provided.

And the court does further find that the said petitioner is entitled to fair compensation for the use of said rolling stock described in his said intervening petition by the receiver of this cause upon the railroad of The Cincinnati Northern Railway Company, defendant herein, and for any deterioration by reason of such use.

But the court defers the determination of the amount of such compensation until the coming in of the report thereon of the master appointed in this cause on the 5th day of April, A. D. 1884.

And the court does further find that the said petitioner is entitled to take and repossess himself of his said rolling stock, wherever the same may be found, in the possession of the receiver appointed in this cause or of the receiver appointed in causes # 3576, 3577, 3578, and 3579 in this court.

And leave is hereby granted to said petitioner to apply at any time to this court for any additional orders that may be necessary in that behalf.

And the said R. Suydam Grant applied for leave to answer the petition of the complainant, The Central Trust Co., filed March 15, 1884, and to support his answer by affidavits — proposed are by force of the foregoing decree rendered unnecessary, declined to grant the leave asked and refused to permit an answer to said petition for rehearing, on affidavits or other proof in support thereof, to be filed; and thereupon the intervening petitioner, R. Suydam Grant, in open court prayed an appeal from the foregoing decree, which is disallowed by the court.

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } *ss:*

I, B. R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 22nd day of January, A. D. 1887.

B. R. COWEN, *Clerk,*
[SEAL.] By R. C. GEORGI, *Deputy.*

* * * * * * *

(Record, p. 378 to p. 408, incl.)

And afterwards, to wit, on the 8th day of February, A. D. 1887, the following petition of the Grant Locomotive Works was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Petition of the Grant Loco. Works.

In the United States Circuit Court, Southern District of Ohio, Western Division.

THE CENTRAL TRUST COMPANY OF NEW YORK, Complainant, *vs.* THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD COMPANY, The Toledo, Cincinnati and St. Louis Railroad Company, and Granville D. Braman, Respondents.	In Chancery. # 3577, 3576, 3579, 3578, 3554.

To the honorable the judges of the circuit court of the United States for the southern district of Ohio (western division):

Your petitioner, The Grant Locomotive Works, respectively shows unto this honorable court as follows:

I. That on August 1, 1882, your petitioner, The Grant Locomotive Works of Paterson, and the Toledo, Cincinnati and St. Louis Railroad Company entered into a contract for the conditional sale

or lease to the said railroad company of ten locomotives, of the value and agreed price or aggregate rental of $105,000—payable August 1, 1883, $20,000; August 1, 1884, 27,000; August 1, 1885, 27,000; August 1, 1886, 31,000; in all, $105,000, together with six per cent. interest, taxes, and insurance premiums, the railroad company as vendee and lessee being bound to keep the locomotives fully repaired.

II. That the said locomotives were duly delivered by your petitioner to the said railroad company, and were used by it in the operation of its railroad up to August 1st, 1883.

III. That on August 1, 1883, one G. D. Braman, a judgment creditor of the said railroad company, filed a creditor's bill in the United States circuit court for the district of Illinois, in the seventh circuit, praying, among other things, for the appointment of a receiver of the property of said railroad company, and alleging that the public interests and the interest of all the owners and creditors of the said company would greatly suffer should its line of railroad cease to be operated, and that the same could not be operated without the continued use thereon of the aforesaid ten locomotives, which the complainant stated he was informed and believed were likely to be withdrawn if overdue payments thereon were not soon made; that to this bill The Central Trust Company of New York, complainant herein, as trustee of the mortgage creditors of said railroad, voluntarily entered its appearance, and it acquiesced in the appointment of the receiver thereunder in accordance with the prayer of the bill.

That thereupon Edwin D. Dwight was appointed receiver by the United States circuit courts in the States of Illinois and Indiana of the property of the Toledo, Cincinnati and St. Louis Railroad Company in those States, and on August 2nd, 1883, under ancillary proceedings in the United States circuit courts in Ohio, the said Dwight was also appointed receiver of all the property of the said railroad company in the State of Ohio.

That in the orders appointing the said receiver it was, among other things, provided that the receiver should take possession and operate the said railroad and premises described in the said bill of complaint, and should pay all debts due for wages, materials, and supplies incurred in the operation and maintainance of the said property during the six months then last past.

That Dwight, as receiver, entered into possession of all the property in the three States named, and thus took possession of the said ten locomotives, the subject of the conditional sales and leases before mentioned, and thereafter used the said locomotives in the operation of the railroad property.

IV. That default was made on August 1, 1883, in the payment of $20,000 and interest, then due under the said contract with your petitioner, The Grant Locomotive Works, and thereupon, under the terms of the said contract, your petitioner became entitled to reclaim the locomotives sold or leased by it.

V. That on or about August 18, 1883, demand was made by your petitioner upon Dwight, as receiver aforesaid, for the surrender of the said locomotives, but the said Dwight, as receiver, refused to sur-

render the same, but, as such receiver, then promised the agent of your petitioner that if the said locomotives were left with him he would purchase and pay for them at a valuation equal to the amount of the instalments or rentals remaining unpaid under the said contract.

VI. That on August 25, 1883, your petitioner presented a petition to the United States circuit court in Illinois, praying for an order directing Dwight, as receiver, to surrender the said ten locomotives, or for other relief, in accordance with the agreement of the said receiver before alleged.

That formal action upon this petition was postponed, owing to a conflict of jurisdiction which had arisen between the judges of the sixth and seventh circuits as to some of the property in the hands of the receiver, but that on or about Sept. 18, 1883, the said Dwight, as receiver, after taking instructions directly from the court which had appointed him, fully ratified and completed the agreement of purchase above alleged, and contracted as such receiver to take the said locomotives and to pay therefor to your petitioner the full contract price, with interest and without discount.

VII. That on Oct. 20, 1883, by an order made in the above-entitled foreclosure suit instituted by the Central Trust Company of New York against the said railroad Co., the said Dwight was removed as receiver of the property of the railroad Co. in the State of Ohio and Wm. J. Craig was made receiver thereof in the place and stead of the said Dwight, and subsequently the said Craig was likewise made receiver of the said property in Illinois and Indiana in the place and stead of the said Dwight, and that it was further ordered in the U. S. circuit court for the district of Illinois that the receivership already existing under the order theretofore entered in the Braman suit should be extended over and made to apply to the premises and property sought to be foreclosed.

That the said Craig entered into possession of the said property as receiver on November 1, 1883, and thus took possession of the said locomotives, and thereafter used the same in the operation of the railroad property.

That the said locomotives had been by the receiver distributed to different divisions of the said railroad, with the result that some were in use upon the Cincinnati Northern railway and some upon the Dayton and Southeastern Division.

VIII. That in Oct., 1883, your petitioner presented its intervening petition in this cause praying for a surrender of the locomotives or for other relief, and thereupon a rule was granted directing the receiver to answer, and that said answer was subsequently filed by the receiver, admitting the contract aforesaid, the receiver's possession of the locomotives, and alleging that the same were necessary to the successful operation by him of the said railroad, and praying the court to make such order as would enable him to retain the possession and use of the said locomotives.

IX. That in and by the petition last aforesaid and the answer thereto and the other proceedings in the cause it then appeared that the said railway company, although it had never paid its

bonded interest, had yet been allowed by the mortgage bondholders and their trustees to remain in the possession and management of the railroad property; that the appointment of the said Dwight as receiver, although made at the suit of the said Braman as judgment creditor, was in fact a collusive proceeding procured in the interest of the mortgage bondholders and acquiesced in by their trustee; that the said Dwight, as receiver, had taken possession of the petitioner's property in the same interest, and, notwithstanding the default in the agreement for the conditional sale and lease thereof, had refused to surrender possession thereof when demanded by your petitioner, upon the ground that his retention thereof was essential and necessary to the operation of the railroad property; that the appointment of the said Craig as receiver in the place and stead of the said Dwight was made upon the motion of the said mortgage trustees and at their suit, and that upon a like demand for the return of your petitioner's locomotives the said Craig refused to surrender the same for the reason that the same were necessary to the operation of the said railroad; that repeated applications have been made on behalf of your petitioner, both to the receivers and also to the courts appointing the same, for the return of the locomotives or for the payment of the purchase price thereof; that the said locomotives *was* essential to the operation of the railroad property, and they retained possession and use of said locomotives in the interest of the mortgage bondholders and against the will and demand of your petitioner; that the said receivers never claimed any right to retain the said locomotives except upon condition of ultimate full payment to your petitioner of their value; that the said receiver Dwight had in term- agreed as receiver to purchase the said locomotives and to pay the full contract price thereof, together with interest and without discount; that the said receiver Craig, in his answer aforesaid, admitted the facts stated by your petitioner and prayed the court to make such orders as would enable him to retain possession and use of said locomotives and at the same time fully protect the right- of your petitioner; that the said Craig, as receiver, afterwards, on Dec. 17, 1883, agreed to the valuation fixed in the contracts, and by his counsel consented to the entry of the decrees securing to your petitioner the payment of the same, with interest, and that it had been announced by the judge presiding in this court, on Nov. 23, 1883, in open court and in the presence of the solicitor of the mortgage trustees, who made no objection to the same, that your petitioner's locomotives aforesaid should be paid for either by the issue of receiver's certificates or in any speedier way practicable.

X. That on Dec. 22, 1883, decrees were entered herein in the matter of the said intervening petition, ordering, adjudging, and decreeing that the receiver pay to your petitioner, as rentals and in full for all claims for rentals, interest, and repairs and for purchase-money, the aggregate sum of one hundred and ten thousand three hundred and fourteen ($110,314) dollars, and apportioning such payments between the separate divisions of the said railroads according to the distribution of the said ten locomotives.

Copies of the said decrees are hereto annexed, marked Schedules

"A" and "B." The said decrees were entered with the consent of the receiver's solicitors and with the knowledge of the solicitors of The Central Trust Co., complainant in the principal cause.

The said decrees were so entered at the October term of this court for the year 1883.

XI. That the February term of this court for the year 1884 passed without further action herein in the matter of the said intervening petition.

XII. That by orders directed to be entered herein by Judge Baxter, of his own motion, on the 10th day of April, 1884, in the April term of this court for the year 1884, copies of which orders are hereto annexed, marked Schedule C, it was directed that the said decrees, Schedules A and B, should be vacated.

That the said order, Schedule C, was based upon a mistake of the facts as presented by the record in this cause; and your petitioner insists that notwithstanding the recitals in the said order, Schedule C, the said decrees, Schedules A and B, were entered after an understanding with and notice, both actual and constructive, to the solicitors of the complainant, the mortgage trustee; and, further, that they were abundantly sustained by the sworn answer of the receiver, by the correspondence of record, and by the uncontradicted facts as they existed and as they were stated upon the face of the decrees; that they were entered with the written consent and approval of the receiver; that they were in accordance with the contracts and agreements made both with the company and with the receivers under the actual or implied assent of the mortgage bondholders; that they were authorized by the pleadings and correctly recited the facts thereof; that they were presented to the court nearly two weeks prior to their entry, and that the solicitors for the receiver and the complainant, the mortgage trustee, had notice thereof and opportunity to examine and correct the same; that they followed the views which had been expressed by the court in the presence of one of the solicitors for the complainant, the mortgage trustee, without objection upon his part; that after entry they were brought to the notice of all the parties to the cause and remained without objection for more than a reasonable time, and that the said decrees were, under the circumstances, entirely fair and just to the mortgage bondholders represented by the complainant, trustee, and to all interested in the cause.

XIII. That your petitioner is advised and believes that the said order, Schedule C, entered herein on the 10th day of April, 1884, purporting to vacate the decrees entered on the 22nd day of Dec., 1883, *were* not only based upon an erroneous view of the facts, but, moreover, *were* beyond the power of the court to make, and *were* of no effect and void, and your petitioner has at all times protested against the same.

Not only was the said order, Schedule C, entered by the court of its own motion at the said April term and after the expiration of the October term of 1883, at which the decrees, Schedules A and B, were entered, but also after the intervention and expiration of the February term of this court for the year 1884; that, moreover, the

said order, Schedule C, was entered without proof, without change in petition of your petitioner or of the receiver's answer thereto, or without other change in the pleadings in the cause and with the record standing unchanged from its position on Dec. 22, 1883, when the said decrees, Schedules A and B, were entered.

XIV. That by virtue of an order made herein April 5, 1885, it was referred to Hon. Jacob D. Cox, as master, directing him to ascertain the amount of the leased equipment upon the raid railroad, the use made of the same, the necessity for its continued use, and what would be a fair and just compensation for the past and future use thereof, and also what, if any, deterioration the said equipment had suffered since it came to the hands of the receiver; that your petitioner, although protesting in writing that the said order and the proceedings thereon should not affect *his* claim herein, did, thus protesting, attend before the said master and make proof as to the use made by the receiver of said ten locomotives and as to their value and condition; that the said master made a report unto this court as to all the matters referred to him, and therein reported that the said 10 locomotives had been used by the said receivers, and that their continued use was necessary in the operation of the property; that the said master further reported that there should be allowed and paid to your petitioner for the said locomotives the sum of $160 per month rental from the 1st day of August, 1883, and reporting also the rent due for the six months prior to said date, at same rate, with an allowance for damages, and no more, instead of the sum of $110,314, which this court had, on Dec. 22, 1883, decreed should be allowed and paid to your petitioner for the said locomotives.

That your petitioner duly protested against any confirmation of the report of the said master so far as the same affected *his* claim, but your petitioner is informed and believes that on the 12th day of November, 1885, an order was entered confirming the said report generally, but reducing the monthly rental to $115 per month and disallowing all rentals and repairs prior to Nov. 1, 1883, copy of which order is hereunto annexed, marked Schedule "D."

That your petitioner is, however, advised and believes that the entry of said order was without effect upon your petitioner's claim herein, the same having been adjudicated by the said decrees entered on Dec. 22, 1883, and the said decrees never having been effectively vacated or altered.

XV. That the said 10 locomotives at all times subsequent to the appointment of the receivers aforesaid and until the sale of the said railway property and its transfer to the purchasers thereof, July 22, 1884, remained in the possession and use of the said receivers and formed an essential part of the equipment employed by the receivers in the operation of the said railroad.

That no sum of money whatever has ever been paid to your petitioner by either the said receivers for such use of the said locomotives or by way of compensation for the deterioration suffered by the said locomotives during such use.

That the said locomotives suffered very serious deterioration in the said use; that the proper and usual repairs were not made to

the same, so that the said locomotives were, on said 22nd day of July, 1884, by reason of the said deterioration and want of repair alone, of very much less value than they were when the return thereof was demanded by your petitioner from the said receiver.

That the market value of locomotives of the class to which the said ten locomotives belong very seriously depreciated since your petitioner demanded from the receivers the return thereof and prior to July 22, 1884, and that your petitioner could not at said last-named date obtain for the said locomotives, had they been in good order, more than thirty per cent. of the sum of money which your petitioner could have obtained therefor had the receivers returned the said locomotives to it upon its demand.

That after July 22, 1884, and to this date the purchasers retained said locomotives in use, but upon special agreement as to rental, and such was to be without prejudice to the legal rights of the parties pending the final determination of the questions herein.

XVI. That your petitioner is advised and believes that it is entitled to be paid and allowed — to it by the said decrees entered Dec. 22, 1883, and that the same should be ordered paid to your petitioner out of the net income, if any there be, of the receivership, and in default thereof, then out of the proceeds of the sale of the *corpus* of the railroad property.

Wherefore your petitioner prays that it may be ordered and decreed that the said decrees entered herein on the 22nd day of Dec., 1883, are still valid and effectual decrees, adjudicating finally the said rights of your petitioner herein, and that the orders entered herein on the tenth day of April, 1884, purporting to vacate the said decrees, and the order entered herein on the 5th day of April, 1884, so far as the same can be considered to refer to a master the matters of your petitioner's claim, and any order herein confirming any report of the said master may, and each of the same may, be ordered and decreed to be without effect upon the rights of your petitioner, and that it be ordered and decreed that your petitioner shall be paid and allowed for its said equipment the sum of $110,314, together with interest from the said 22nd day of December, 1883, to be paid out of the net income of the receivership, if any, so far as the same shall suffice, and that it be further ordered, adjudged, and decreed that any balance of your petitioner's said claim so ascertained not so paid shall be paid out of the proceeds of the sale of the mortgaged property in the principal cause herein, or that your petitioner may have such other or further relief as to your honors may seem meet in the premises; and your petitioner will ever pray.

GRANT LOCOMOTIVE WORKS, *Petitioner*,
By R. S. GRANT, *Pres'd.*

BLUFORD WILSON, *Solicitor.*

UNITED STATES OF AMERICA,
Southern District of New York, } *ss.:*

R. S. Grant, being duly sworn, on his oath deposes and says that

he is the president of The Grant Locomotive Works, the petitioner above named; that the facts set forth in the foregoing petition so far as they purport to be stated as of his own knowledge are true, and so far as they purport to be stated upon information and belief he believes to be true.

R. S. GRANT.

Subscribed and sworn to before me this 5th day of Feb., 1887.

CARSTEN WENDT,
Notary Public, Kings County. [SEAL.]

Certf. filed in New York Co.

SCHEDULE "A."

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } *ss:*

At a stated term of the circuit court of the western division of the southern district of Ohio, in the 6th judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of October, being the second day of that month, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and eighth—present, the Hon. Geo. R. Sage—on Saturday, the 22nd day of December, 1883, among the proceedings had were the following, to wit:

THE CENTRAL TRUST CO. OF NEW YORK, Complainant,
against
THE CINCINNATI NORTHERN RAILWAY Co. *et al.* } In Chancery. # 3578.

In the matter of the intervening petition of the Grant Locomotive Works and the American Loan and Trust Co.

The said cause came on to be heard upon the petition and the answer of the receiver thereto and upon the evidence submitted on behalf of said petitioners.

And it appearing to the satisfaction of the court that the receiver has in his possession Grant locomotive # 63 and is using the same in the operation of the said Cincinnati Northern Railway Co., between Cincinnati and Dayton, Ohio, and that the said locomotive is one of the 10 covered by the agreement of lease set out in said petition, and was acquired by The Toledo, Cincinnati and St. Louis Railroad Co., one of the defendants, under the terms of said agreement, and was so held at the date of the appointment of the receiver herein;

And it further appearing that the present receiver or his predecessor took the said locomotives, with its tender, into his possession as such receiver on the first day of August last, and has had the same without having made any payment on account of rental, as provided in said indenture of lease, or other compensation for the use thereof;

And it further appearing that the said locomotive is, in the judgment of the receiver, necessary to the proper operation of said railway and should be acquired as part of its permanent equipment, and that the petitioners are willing, upon receipt of the contract price or upon being adequately secured therein, to transfer the title of the same to the receiver;

And the matter being fully heard by the court, and upon due deliberation thereon, it is hereby ordered, adjudged, and decreed that the receiver pay to the said petitioner-, as rental for said locomotive and tender and in full for all claims for rental, interest, and repairs down to the first day of Dec., 1883, the sum of $2,361.30, the same being the amount due to said date under the terms of said lease.

And the further sum of $8,670, balance in full as purchase-money for said locomotive and tender.

And it is further ordered that the receiver pay said several amounts, as part of the operating expenses of the said railway, out of any money not appropriated for the payment of current labor, supplies, and taxes.

And it is further ordered and decreed that the said several amounts, with interest thereon, at the rate of six per cent., from the 1st day of Dec., 1883, shall be a charge upon the earnings, income, and all the property of the said Cincinnati Northern Railway Co. as ahead of the first-mortgage or other bonded debt of said company, and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of the said railway shall be a first lien thereon, and the said sale shall be made subject thereto.

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } *ss:*

I, B. R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, this 24th day of January, A. D. 1887.

B. R. COWEN, *Clerk*,
[SEAL.] By R. C. GEORGI, *Deputy*.

SCHEDULE B.

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } *ss:*

At a stated term of the circuit court of the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of October, being the second day of that month, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and eighth—present, the

Hon. Geo. R. Sage—on Saturday the 22nd day of Dec., 1883, among the proceedings had were the following, to wit:

THE CENTRAL TRUST CO. OF NEW YORK
against
THE TOLEDO, CINCINNATI AND ST. LOUIS Railroad Co. (Dayton and Southeastern Division) *et al.*, Defendants. } In Chancery. # 3578.

In the matter of the intervening petition of the Grant Locomotive Works and the American Loan and Trust Co.

The said cause came on to be heard upon the petition and the answer of the receiver thereto and upon the evidence submitted on behalf of said petitioners.

And it appearing to the satisfaction of the court that the receiver has in his possession Grant locomotives # 57 to 62, inclusive, and 64 to 66, inclusive, with tenders, and is using the same in the operation of the said Southeastern Division of the defendant company's railroad between Dayton and —, Ohio, and that the said locomotives are nine of the ten covered by the agreement of lease set out in said petition, and were acquired by said defendant, The Toledo, Cincinnati and St. Louis Railroad Co., under the terms of said agreement, and were so held at the date of the appointment of the receiver herein;

And it further appearing that the present receiver or his predecessor took the said locomotives into his possession as such receiver on the first day of August last, and has had the same in continuous use and possession since that date without having made any payment on account of the rental, as provided in said indenture of lease, or other compensation for the use thereof;

And it further appearing that the said locomotives are, in the judgment of the receiver, necessary to the proper operation of the said division of said railway, and should be acquired as part of its permanent equipment, and that the value of said locomotives and tenders as fixed in said agreement of lease is reasonable, and that the petitioners are willing, upon the receipt of the contract price or upon being adequately secured therein, to transfer the title of the same to the receiver;

And the matter being fully heard by the court, and upon due deliberation thereon, it is ordered, adjudged, and decreed that the receiver pay to the said petitioners, as rental for said locomotives and tenders and in full for all claims for rental, interest, and repairs down to the first day of Dec., 1883, the sum of $21,252.70, the same being the amount due to said date under the terms of said lease, and the further sum of $78,030, balance in full as purchase-money for said locomotives and tenders.

And it is further ordered that the receiver pay said several amounts, as part of the operating expenses of the said Southeastern Division, out of any money not appropriated for the payment of current labor, supplies, or taxes.

And it is further ordered and decreed that the said several amounts,

with interest thereon, at the rate of six per cent., from the 1st day of December, 1883, shall be a charge upon the income, earnings, and all the property of the said Toledo, Cincinnati and St. Louis railroad, and especially of said Southeastern Division, prior to the first-mortgage or other bonded debt of said railroad or said division thereof, and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of the said railroad or said division shall be a first lien thereon, and the said sale shall be made subject thereto.

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } *ss:*

I, B. R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, this 24th day of January, A. D. 1887.

[SEAL.]

B. R. COWEN, *Clerk,*
By R. C. GEORGI, *Deputy.*

SCHEDULE C.

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } *ss:*

At a stated term of the circuit court of the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of April, being the first day of that month, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States of America the one hundred and eighth—present, the Hon. John Baxter, judge—on Thursday, the 10th day of April, 1884, among the proceedings had were the following, to wit:

THE CENTRAL TRUST CO. OF NEW YORK, &c.,
against
THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD CO. *et al.* } #3578. In Chancery.

This day this cause came on further to be heard upon the intervening joint petition of the American Loan and Trust Co. and of the Grant Locomotive Works, filed in this cause on the 27th day of October, A. D. 1883, and the court, being fully advised in the premises, does order, adjudge, and decree as follows, viz:

The court finds that the two decrees herein made and entered upon said petition on the 22nd day of Dec., A. D. 1883, were entered without notice to the complainant herein and without proof; that the

said decrees are erroneous and unjust to the bondholders for whom the said complainant is trustee, and are unauthorized by the pleadings, and are based upon a misrecital of the facts as evidenced by the record in this cause; that said decrees were authorized by the court without examination, in the erroneous belief, entertained at the time, that all the parties in interest had assented to said decrees, and that the parties adversely interested acquired no knowledge of the allowance of said decrees until about the 24th day of Feb., A. D. 1884, and after the adjournment of the term of court at which the same were entered, and thereupon it is by the court, of its own motion, adjudged, ordered, and decreed that the said decrees be, and they are hereby, annulled, set aside, and held for naught; and the court, coming now to determine the questions arising upon the said intervening petition of the American Loan and Trust Co. and of the Grant Locomotive Works, does order, adjudge, and decree as follows, viz:

That the relief prayed for in the said intervening petition be, and it is hereby, denied, except as hereinafter provided, and the court does further find that the said petitioners are entitled to fair compensation for the use of said rolling stock described in their said petition by the receiver in this cause upon the railroad of the defendant, The Toledo, Delphos and Burlington Railroad Company, commonly known as the Southeastern Division of the Toledo, Cincinnati and St. Louis railroad, and for any deterioration by reason of such use; but the court defers the determination of the amount of such compensation until the coming in of the report thereon of the master appointed in this cause on the 5th day of April, A. D. 1884; and the court does further find that the said petitioners are entitled to take and repossess themselves of their said rolling stock wherever the same may be found in the possession of the receiver appointed in this cause or of the receiver appointed in causes #3554, 3576, 3577, or 3578 in this court, and leave is hereby granted to said petitioners to apply at any time to this court for any additional orders that may be necessary in that behalf; and the said American Loan and Trust Co. and Grant Locomotive Works applied for leave to answer the petition of the complainant, The Central Trust Co., filed March 15, 1884, and to support their answer by affidavits or other proof, and the court, entertaining the opinion that the answer and affidavits proposed, and by force of the foregoing decree rendered unnecessary, declined to grant the leave asked and refused to permit an answer to said petition for rehearing on affidavits or other proof in support thereof to be filed; and thereupon the intervening petitioners, The American Loan and Trust Company and Grant Locomotive Works, in open court prayed for an appeal from the foregoing decree, which is thereupon disallowed by the court.

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } ss:

I, William C. Howard, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify

that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, this 14th day of April, A. D. 1884.

WM. C. HOWARD, *Clerk*,
By R. C. GEORGI, *Deputy*. [SEAL.]

SCHEDULE "D."

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } ss:

At a stated term of the circuit court of the western division of the southern district *of the southern district* of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of October, being the sixth day of that month, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States of America the one hundred and tenth.

Present: The Hon. Geo. R. Sage, district judge, and Hon. John Baxter, circuit judge.

THE CENTRAL TRUST CO. OF NEW YORK
against
THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD CO. *et al.* } In Chancery. # 3578.

At Cincinnati, in said district, on the 12th day of November, A. D. 1885.

Present: Hon. John Baxter and Hon. Geo. R. Sage, judges.

This cause coming on this day to be heard upon the report of Jacob D. Cox, special master herein, filed June 26th, 1884, and upon the several exceptions of the several parties in interest to the said report, and upon the testimony, exhibits, and proof accompanying the said report; and thereupon the court having heard the arguments of counsel for the respective parties in interest and being now fully advised in the premises—

The court doth order, adjudge, and decree that the various owners of cars and locomotives embraced in the petitions of intervention and in the report of said Jacob D. Cox, special master, do have and recover for the use of their respective cars and locomotives, at the rates hereinafter specified, from the time William J. Craig, as receiver in this cause, took possession as receiver of the property sold, namely, November 1, 1883, to the 22nd day of July, 1884, at the following rates, namely:

For locomotives, at the rate of	$115 00	per month.
For passenger cars, at the rate of	36 00	" "
For baggage, express, and caboose cars, at the rate of	18 00	" "

For box cars, at the rate of	5 00	per month.
For stock cars, at the rate of	8 00	" "
For coal cars, at the rate of	4 50	" "
For gondolas, at the rate of	4 50	" "
For flat cars, at the rate of	3 50	" "

The court doth further order, adjudge, and decree that the special master hereinafter designated. do take and consider all the testimony and exhibits taken before Jacob D. Cox, special master, heretofore appointed by the United States circuit court for the district of Indiana on Dec. 1st, 1884, concerning the amount due to the owners of such cars and locomotives for repairs thereon, and that he report to the court therefrom his conclusions as to the amount which should be allowed for such repairs during the receivership of the said William J. Craig.

The court doth further order, adjudge, and decree that all such rentals and repairs are a prior and paramount lien, to be paid out of the proceeds of the foreclosure sale of the mortgaged premises prior to any distribution of such proceeds among the holders of the bonds secured by said mortgage.

The court doth further order, adjudge, and decree that the claims of the owners of all such cars and locomotives for rental for the use of the same and for repairs for the period of six months prior to the appointment of E. E. Dwight as receiver, namely, August 1, 1883, be, and the same are hereby, disallowed; and the court doth further order that the claims of the said owners of cars and locomotives for rental for the use of the same and for repairs for the three months covered by the receivership of said E. E. Dwight, to wit, from the 1st day of August to the 1st day of November, 1883, be, and the same are hereby, disallowed.

The court doth further order, adjudge, and decree that the owners of such cars as have been destroyed while in use upon said railway between the said first day of November, 1883, and July 22, 1884, *to* have and recover the full value thereof at the time of such destruction, to be determined by reference to a master, as hereinafter provided, and that the same is a prior and paramount lien, to be paid out of the proceeds of the foreclosure sale of the mortgaged premises prior to any distribution of such proceeds among the holders of the bonds secured by said mortgage.

The court doth further order, adjudge, and decree that the rentals and repairs due for all the cars and of locomotives in use by the receiver from Nov. 1, 1883, to July 22, 1884 (being the date — the surrender by said receiver of the property in his custody as receiver herein), be apportioned among and paid by the several divisions upon the percentage reported by the said Jacob D. Cox, special master, as set forth in his report, as follows, namely:

Divisions.	Per cent.
Toledo Terminal	.40
Toledo Division	23.79
Dayton Division	12.98

Divisions.	Per cent.
Dayton and Southeastern Division	32.67
Iron Railroad Division	1.98
Cincinnati Northern Division	.36
St. Louis Division	4.16
	22.66

The court doth further order, adjudge, and decree that this cause be, and the same is hereby, referred to William P. Fishback, as special master, to report to the court, in accordance with the provisions hereof, the amount due to each petitioner or owners of cars and locomotives for rentals and repairs as well as for such cars as have been destroyed while in use by said receiver, and that said master shall report the amount of rental due to David B. Paul, trustee, for the use by said receiver of fifty sets of trucks described in the petition of the said David B. Paul, trustee.

As to all exceptions to the report of Jacob D. Cox, special master, which are inconsistent herewith it is ordered that the same be, and they are hereby, overruled, and in other respects such exceptions are hereby sustained.

From which order and decree the petitioners, R. S. Grant, The Grant Locomotive Works, and The American Loan and Trust Company, trustee; E. B. Phillips, trustee; The American Loan and Trust Co., trustee; The United States Rolling Stock Company—David B. Paul, trustee; Pennock Brothers; Clark, Post and Martin, and George William Ballou, trustee, respectfully pray, each for himself, an appeal, which is allowed to each, respectively, upon giving a bond, with sufficient surety, in the penal sum of five hundred dollars.

It is further ordered that the said special master do take proof and report to the court the amounts which should be allowed to the owners of such cars and locomotives as rental for the use of the same by George Hafer, as receiver of the Cincinnati Northern railroad, during such period as they may have been used by him, as well as the value of such cars and locomotives as may have been destroyed while used by said Hafer as such receiver.

JOHN BAXTER, *Judge, &c.*

THE UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } *ss:*

I, B. R. Cowen, clerk of the — court of United States within and for the division and district aforesaid, do hereby certify that the foregoing is truly taken and correctly copied from the journal of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, this 24th day of January, A. D. 1887.

B. R. COWEN, *Clerk,*
[SEAL.] By R. C. GEORGI, *Deputy.*

* * * * * * *

(Record, p 411 & p. 412.)

And afterwards, to wit, on the 5th day of April, A. D. 1887, the following demurrer of purchasers was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Demurrer of Purchasers.

In the Circuit Court of the United States, Southern District of Ohio, Western Division.

THE CENTRAL TRUST CO. OF NEW YORK
vs.
THE T., D. & B. R. R. CO., THE T., C. & ST. L. R. R. CO., *et al.*

The purchasers of the Dayton and Southeastern, the Dayton, and the Cincinnati & St. Louis Railroad Co., by protestation, not confessing all or any of the matters and things in the intervening petition of R. S. Grant contained to be true in such manner and form as the same *is* therein set forth, *doth* demur to said petition, and for cause of — showeth that said petitioner had not made or stated such a case as entitled him in a court of equity to any relief; and for further cause of demurrer show that the said petition doth not contain any matter of equity whereon this court can give the petitioner any relief against the purchasers herein.

Wherefore, and for divers other good causes of demurrer appearing in the said petition, the purchasers *doth* demur thereto, and humbly demands the judgment of this court whether they shall be compelled to make any further or other answer to said petition.

C. W. FAIRBANKS,
Solicitor for D. & S. E., Dayton, and Cincinnati Northern Div's.

I, C. W. Fairbanks, do hereby certify that the above demurrer is well taken in point of law.

C. W. FAIRBANKS.

UNITED STATES OF AMERICA,
District of Ohio, Western Division.

C. W. Fairbanks, being first duly sworn, on oath says that the above demurrer is not interposed for delay.

C. W. FAIRBANKS.

Subscribed and sworn to before me this 5th day of April, 1887.

ROBERT C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O. [SEAL.]

* * * * * * *

(Record, p. 414 to p. 423, incl.)

And afterwards, to wit, on the 23rd day of April, A. D. 1887, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer of the Central Trust Co.

Circuit Court of the United States, Southern District of Ohio, Western Division. In Chancery.

THE CENTRAL TRUST CO. OF NEW YORK, Complainant, *vs.* THE TOLEDO, DELPHOS AND BURLINGTON RAILroad Company, The Toledo, Cincinnati and St. Louis Railroad Company, and Others.	#3554, 3576, 3577, 3578, 3579.

Answer of the Central Trust Company to the petition of R. S. Grant.

The Central Trust Co. of New York to the petition of R. S. Grant, filed on the 8th day of February, 1887, says:

First. That it did not acquiesce in the appointment of Edwin E. Dwight as receiver in the suit of Granville D. Braman against The Toledo, Cincinnati, and St. Louis Railroad Company, said appointment being made in August, 1883.

Second. That it has no knowledge or information as to whether the said Dwight, as such receiver, took possession of the said ten locomotives and used the same in the operation of the railroad property, and therefore denies that he did as such receiver take possession of said locomotives or used them as such receiver in the operation of said railroad.

Third. That it is not true that said receiver promised the petitioner that if said locomotives were left with him he would purchase and pay for them at a valuation equal to the amount of the instalments or rentals remaining unpaid under said contract, and that if said receiver did make said promise he had no authority whatever to make the same, and said promise, if made by said receiver, was and is null and void and of no effect.

Fourth. It says it is not true that said Dwight ratified and completed the agreement of purchase of said locomotives, or that he contracted as a receiver to take said locomotives and to pay therefor to the petitioner the full contract price, with interest and without discount; but it says if said receiver did so ratify or complete said agreement or did contract as such receiver to take said locomotives and pay therefor the full contract price said act of said receiver was without authority and is and was null and void.

Fifth. It says it has no knowledge that said receiver, William J. Craig, distributed said locomotives to the different divisions of said railroad with the result that some were in use upon the Cincinnati Northern railway and some upon the Dayton and Southeastern Division, and denies the same.

Sixth. That it is not true that said mortgage bondholders and their trustees permitted said railway company to remain in the possession and management of the railroad property, and it is not true that the appointment of said Dwight as receiver was a collusive proceeding in the interest of the mortgage bondholders; *that it is*

not true that the appointment of said Dwight as receiver was a collusive proceeding in the interest of the mortgage bondholders; that it is not true that said Craig was appointed receiver in the place and stead of said Dwight; on the contrary, the Central Trust Company says that said Craig was appointed receiver of the respective roads consolidated into the Toledo, Cincinnati and St. Louis Railroad Company in the separate actions begun by the Central Trust Co. as trustee under the mortgage securing first bonds on said respective roads, and that said Dwight was appointed receiver of the consolidated company in an action begun by a judgment creditor against it. The said Central Trust Co. says it has no knowledge, information, or belief that the said receiver always insisted that the retention of said locomotives was essential to the operation of said railroad, and that they retained possession and use of said locomotives in the interests of the mortgage bondholders and against the will and demand of the petitioner, and says that the same is not true, and that it is not true that the said Craig, as receiver, agreed to the valuation of said locomotives fixed in the contract, but it says if he did so it was without authority.

And the said Central Trust Company further says that if the judge presiding in this court on November 23, 1883, announced in open court and in the presence of the solicitor of the mortgage trustees that the locomotives in question should be paid for by issue of receiver's certificates or in any speedier way practicable, said solicitor was and is unconscious thereof, and the said Central Trust Co. denies that said announcement was so made.

The Central Trust Co. further states that the decrees of Dec. 22, 1883, were entered without its knowledge or consent and under a misapprehension on the part of the court, and that it is not true that said decrees were entered with the knowledge of the solicitors of the Central Trust Co., and it is not true that said decrees of Dec. 22, 1883, or either of them were entered after an understanding with or after notice to the solicitors of The Central Trust Co., complainant in said case, and it says it is not true that there is any correspondence or any record or any facts sustaining the claim made in the petition herein that said decrees were entered after an understanding with or upon notice to the Central Trust Co. or its solicitors.

And the Central Trust Co. says that neither it nor its solicitors had any notice that said decrees or either of them had been entered until on or about the 24th day Feb., A. D. 1884.

And the Central Trust Company further says that speedily thereafter it filed in this court a petition for the rehearing of said decree, and upon said rehearing the circuit judge set the same aside after argument and due consideration, and at the same time gave said petitioner the right to take possession of and remove said locomotives, and to proceed against the receiver for the value of the use of said locomotives and for compensation for the deterioration in the value of the same by reason thereof.

HOADLY, JOHNSON & COLSTON,
Solicitors for The Central Trust Company.

UNITED STATES OF AMERICA,
Southern District of Ohio, Hamilton County, } *ss:*

Edward Colston, being by me first duly sworn, says that he is one of the attorneys for the Central Trust Co. of New York, a corporation, and that the facts stated in the foregoing answer are true except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

EDWARD COLSTON.

Sworn to before me and subscribed in my presence this 28th of April, A. D. 1887.

JOHN FLACK WINSLOW,
Notary Public, Hamilton County, Ohio. [SEAL.]

And afterwards, to wit, on the 23rd day of April, A. D. 1887, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer of the Central Trust Co.

Circuit Court of the United States, Southern District of Ohio, Western Division. In Chancery.

THE CENTRAL TRUST CO. OF NEW YORK, Complainant, *vs.* THE TOLEDO, DELPHOS AND BURLINGTON RAILroad Company, The Toledo, Cincinnati and St. Louis Railroad Company, and Others.	# 3554, 3576, 3577, 3578, 3579.

Answer of the Central Trust Company to the petition of the Grant Locomotive Works.

The Central Trust Co. of New York to the petition of the Grant Locomotive Works, filed on the 8th day of February, 1887, says:

First. That it did not acquiesce in the appointment of Edwin E. Dwight as receiver in the suit of Granville D. Braman against The Toledo, Cincinnati and St. Louis Railroad Company, said appointment being made in August, 1883.

Second. That it has no knowledge or information as to whether the said Dwight, as such receiver, took possession of the said ten locomotives and used the same in the operation of the railroad property, and therefore denies that he did, as such receiver, take possession of said locomotives or used them as such receiver in the operation of said railroad.

Third. That it is not true that said receiver promised the petitioner that if said locomotives were left with him he would purchase and pay for them at a valuation equal to the amount of the instalments or rentals remaining unpaid under said contract, and that if said receiver did make said promise he had no authority whatever

to make the same, and said promise, if made by said receiver, was and is null and void and of no effect.

Fourth. It says it is not true that said Dwight ratified and completed the agreement of purchase of said locomotives, or that he contracted as a receiver to take said locomotives and to pay therefor to the petitioner the full contract price, with interest and without discount, but it says if said receiver did so ratify or complete said agreement or did contract as such receiver to take said locomotives and pay therefor the full contract price said act of said receiver was without authority and is and was null and void.

Fifth. It says it has no knowledge that said receiver, William J. Craig, distributed said locomotives to the different divisions of said railroad with the result that some were in use upon the Cincinnati Northern railway and some upon the Dayton and Southeastern Division, and denies the same.

Sixth. That it is not true that said mortgage bondholders and their trustees permitted said railway company to remain in the possession and management of the railroad property, and it is not true that the appointment of said Dwight as receiver was a collusive proceeding in the interest of the mortgage bondholders; *that it is not true that the appointment of said Dwight as receiver was a collusive proceeding in the interest of the mortgage bondholders;* that it is not true that said Craig was appointed receiver in the place and stead of said Dwight; on the contrary, the Central Trust Company says that said Craig was appointed receiver of the respective roads consolidated into the Toledo, Cincinnati and St. Louis Railroad Company in the separate actions begun by the Central Trust Co. as trustees under the mortgage securing first bonds on said respective roads, and that said Dwight was appointed receiver of the consolidated company in an action begun by a judgment creditor against it. The said Central Trust Co. says it has no knowledge, information, or belief that the said receiver always insisted that the retention of said locomotives was essential to the operation of said railroad, and that they retained possession and use of said locomotives in the interests of the mortgage bondholders and against the will and demand of the petitioner, and says that the same is not true, and that it is not true that the said Craig, as receiver, agreed to the valuation of said locomotives fixed in the contract, but it says if he did so it was without authority.

And the said Central Trust Company further says that if the judge presiding in this court on November 23, 1883, announced in open court and in the presence of the solicitor of the mortgage trustees that the locomotives in question should be paid for by issue of receiver's certificates or in any speedier way practicable said solicitor was and is unconscious thereof, and said Central Trust Co. denies that said announcement was so made.

The Central Trust Co. further states that the decrees of Dec. 22, 1883, were entered without its knowledge or consent and under a misapprehension on the part of the court, and that it is not true that said decrees were entered with the knowledge of the solicitors of the Central Trust Co., and it is not true that said decrees of

Dec. 22, 1883, or either of them were entered after an understanding with or after notice to the solicitors of The Central Trust Co., complainant in said case; and it says it is not true that there is any correspondence or any record or any facts sustaining the claim made in the petition herein that said decrees were entered after an understanding with or upon notice to the Central Trust Co. or its solicitors.

And the Central Trust Co. says that neither it nor its solicitors had any notice that said decrees or either of them had been entered until on or about the 24th day of Feb., A. D. 1884.

And the Central Trust Company further says that speedily thereafter it filed in this court a petition for the rehearing of said decree, and upon said rehearing the circuit judge set the same aside after argument and due consideration, and at the same time gave said petitioner the right to take possession of and remove said locomotives and to proceed against the receiver for the value of the use of said locomotives and for compensation for the deterioration in the value of the same by reason thereof.

HOADLY, JOHNSON & COLSTON,
Solicitors for the Central Trust Company.

UNITED STATES OF AMERICA,
Southern District of Ohio, Hamilton County, } *ss:*

Edward Colston, being by me first duly sworn, says that he is one of the attorneys for the Central Trust Co. of New York, a corporation, and that the facts stated in the foregoing answer are true except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

EDWARD COLSTON.

Sworn to before me and subscribed in my presence this 28th day of April, A. D. 1887.

JOHN FLACK WINSLOW,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

* * * * * * *

(Record, p. 435.)

And afterwards, to wit, on the 11th day of June, A. D. 1887, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal X, p. 331.

This cause this day was heard upon the petition of R. S. Grant and the Grant Locomotive Works, respectively, herein filed February 8, A. D. 1887, praying that the court set aside certain orders hereinbefore made on the 10th day of April, 1884, setting aside certain other orders theretofore made herein on December 22, 1883, upon the intervening petition of R. Suydam Grant, filed herein on October 27, 1883, and was argued by counsel; and the court being

fully advised in the premises, it is ordered, adjudged, and decreed that said order of said 10th day of April, A. D. 1884, be, and the same hereby is, set aside and held for naught, and that said orders of Dec. 22, 1883, be, and the same hereby are, restored.

And thereupon came complainant, The Central Trust Co., and prayed an appeal to the Supreme Court of the United States from this decree setting aside said order of April 10th, 1884, and restoring said orders of December 22, 1883, which appeal is allowed upon complainant giving bond in the sum of five hundred dollars for costs, to be approved by the clerk of this court.

(Record, p. 436 to p. 454.)

And afterwards, to wit, on the 28th day of January, A. D. 1889, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, page 172.

In the matter of the intervening petition of R. S. Grant.

This cause coming on to be further heard on the motion of said intervening petitioner, by his counsel, B. H. Bristow and Bluford Wilson, to require the purchasers of the railroad property heretofore sold under decree of foreclosure and sale in this case to forthwith pay into the registry of this court, for the use of the said intervenors, the amount due under the decree entered herein; that in default thereof the said railroad property be resold for the benefit of the intervenor;

And the said intervenor being present, by his counsel, and the purchasers of the Dayton and of the Cincinnati Divisions being represented by C. W. Fairbanks, their solicitor, and the Cincinnati, Lebanon and Northern R'y Co., assignee of the purchasers at the foreclosure sale of the Cincinnati Northern R'y, by Wm. M. Ramsey, its solicitor, and the Dayton, Fort Wayne & Chicago Railroad Company, assignee of the purchasers of the Southeastern Division and of the purchasers of the Iron railroad, by John C. Coombs, its solicitor, and R. D. Marshall, the present receiver of the said railroad company, and the purchasers of the main line, the Toledo Terminal, and the St. Louis Division being present by Clarence Brown, their solicitor, objecting to the jurisdiction of the court, and the complainant, The Central Trust Co. of New York, opposing said motion of the said intervenor, being represented by Edward Colston, its solicitor;

And thereupon, pending the hearing upon the said motion, comes the complainant, The Central Trust Co. of New York, on the 15th day of March, 1884, — be now heard as a petition for a rehearing of the said decrees of December 22, 1883; or, if that relief be denied, that the same be taken and held to be a bill of review or a bill in the nature of a bill of review; or, if that relief be denied, that the said petition be amended and supplemented in certain respects as stated in a certain paper now read, and be now docketed as an orig-

inal bill of review as of the 15th day of March, 1884; and after hearing Edward Colston, the counsel for said complainant, in support of the said motion and B. H. Bristow and Bluford Wilson, of counsel for the said intervening petitioners, in opposition thereto, it is ordered that the said application of the complainant and each part thereof be, and the same is, denied in all respects.

To which ruling and order of the court the said complainant duly excepts.

And thereupon, and still pending the hearing upon the motion first before stated, comes the Dayton, Fort Wayne and Chicago Railroad Co., by John C. Coombs, its counsel, and R. D. Marshall, its present receiver, the said railroad company claiming to be the assignee of the purchasers of the Southeastern Division, which railroad was sold under the decree of foreclosure and sale herein, and prays leave to be permitted to intervene herein and be heard herein in review upon the matters of the original orders or decrees entered herein on December 22, 1883, and as set forth in a petition in writing therefor, which it moved the court for leave to file herein; and, after hearing the counsel for said Dayton, Fort Wayne and Chicago Railroad Company in support of said motion and B. H. Bristow and Bluford Wilson, of counsel for said intervening petitioners, in opposition thereto, it is ordered that the application of the said Dayton, Fort Wayne and Chicago Railroad Company for leave to intervene and to file said petition herein be, and the same is, in all respects denied.

To which ruling and order of the court the said Dayton, Fort Wayne and Chicago Railroad Company and its receiver duly except.

And thereupon, the court having fully heard the argument of counsel of the respective parties hereto upon the said motion of said intervening petitioner, R. S. Grant, as first above stated, and having fully deliberated thereon, and the court considering that the order entered herein on the 10th day of April, 1884, was void, and that it had been for that reason set aside and ordered to be held for naught by the order entered herein on June 11th, 1887, and that all the orders or decrees entered herein in pursuance of or in execution of the said order of April 10, 1884, were equally void and of no effect so far as the same purports to effect the rights of the said intervenors, and that the decrees entered herein on December 22, 1883, are now in full force and effect as to the locomotives hereinafter mentioned;

And the court further considering that under the said decrees of Dec. 22, 1883, and under said decree of foreclosure and sale herein and the notice of sale given in pursuance of such decree, and under the sale actually made thereunder and the order of this court confirming the said sale, the purchasers of the mortgage division of said Toledo, Cincinnati & St. Louis R. R. sold in this case took the said railway and property subject to the payment of the sum of $24,871.41, with interest thereon from the 1st day of December, 1883, adjudged by the said decree of Dec. 22, 1883, in respect thereto to be due to the intervenor, R. S. Grant, on account of locomotives # 67, 68, and 72, and by the said decree ordered to be paid by

W. J. Craig, the receiver, in the manner set forth in said decree of Dec. 22, 1883, to the said intervenor, and also adjudged by the said decree to be a first lien upon the Toledo, Cincinnati and St. Louis railroad, and especially on the Southeastern Division thereof;

And the court further considering that the said lien adjudged by the said decree of Dec. 22, 1883, in favor of the said intervenor, R. S. Grant, against the said railroad should be enforced, and also that there should now be enforced the right reserved by this court upon the sale of the Southern Division of the said Toledo, Cincinnati and St. Louis railroad to resell the premises and property so sold in this case upon failure to comply within twenty days with any order of this court directing the purchasers thereof to make such further payment in this case as this court should from time to time direct in order to meet claims adjudged in this case by this court to be prior in equity to the mortgages foreclosed in this case;

And the said intervenors admitting he had already received upon account for the said locomotives #67, 68, and 72, but without prejudice to his rights in the premises, the following sums of money, viz., the amount of $3,600, paid Dec. 15, 1885, upon the sale of locomotive #72 to the Florida Commercial Company, and that after crediting the amounts so admitted to have been paid and adjusting the interest and expenses accounts up to the 12th day of November, 1888, said expense being $1,058.72 for care and repairs of said engines by the intervenor from March, 1885, to August 6, 1886, the net amount remaining due and unpaid to the said intervenor on account of the said locomotives #67, 68, and 72 on the 12th day of November, 1888, is the sum of $29,083.96, and no more, and no one claiming that any other or greater credit should be made upon the said claim;

And as to said locomotives #67 and 68, being in custody of said R. S. Grant for care thereof, said Grant is authorized to sell the same within the next 60 days, after giving to all parties 20 days' *within* notice of the time and place of sale, and after publication or 10 days' prior notice of the same in a daily newspaper in New York city and in the city of Cincinnati, or he may surrender said locomotives to any party in interest, if they so desire, the net proceeds of any such sale to be a credit on the above amount—

Thereupon the court orders as follows:

It is now ordered that the purchasers of the Southern Division of the said Toledo, Cincinnati and St. Louis railroad, as being primarily chargeable therewith as between themselves and the said intervenor under the said decree of Dec. 22, 1883, be and they are required to pay or cause to be paid into the registry of this court, within sixty days from the 28th day of January, 1889, for the use of the said intervenor, R. S. Grant, the amount of $29,083.96, with interest thereon from the 12th day of November, 1888.

And it is further ordered that in default of making of the said payment within the time so limited therefor the said Southeastern Division be resold upon request of the said intervenor herein, the said R. S. Grant, for the payment and satisfaction out of the proceeds thereof of the said sum of $29,083.96, with interest, herein directed to be paid to the said intervenor by the said purchasers.

And it is further ordered that this decree is without prejudice to any right the said intervenors may have to apply for orders to resell other mortgage-divisions of the Toledo, Cincinnati and St. Louis railroad for the payment out of the proceeds of such resale any balance of the amount hereinbefore named, to wit, said sum of $29,083.96, not realized upon any sale of the Southeastern Division.

And it is further ordered that in case any resale of the railroad and property hereinbefore described in this case becomes necessary by reason of default in the payment of said amount hereby ordered to be paid, then such resale shall be made pursuant to the terms of the original decrees for the foreclosure and sale of the said railroads respectively, but by the marshal of this district, who is hereby appointed master commissioner for that purpose, and that leave is given to apply to this court for further directions as to any such sale.

And it is further ordered that this order is and shall be without prejudice to the right of the said Southeastern Division and the purchasers thereof or any other persons or corporation to apply to this and other courts having jurisdiction in the several cases in foreclosure proceedings against the several divisions of the said Toledo, Cincinnati and St. Louis railroad for contribution towards the said amount from said several divisions or the said purchase-thereof, or in the event of the payment of the same by said purchasers of said Southeastern Division to apply for a distribution thereof over and among said other divisions according to the percentage of contribution and distribution applicable thereto, as herein and in said other causes of foreclosure has been or may be determined, or to collect or enforce the payment of said sum by the said Toledo, Cincinnati & St. Louis Railroad Company or out of and against any property thereof, all as the rights not now passed upon but expressly reserved as to such contribution of the said parties, purchasers of said respective mortgage divisions, and said Toledo, Cincinnati and St. Louis Railroad Company, as between each other, shall appear and as this court and any other court having jurisdiction in or touching the premises heretofore may have determined or shall order, adjudge, and decree.

And thereupon the said Central Trust Company of New York prays an appeal to the Supreme Court of the United States from the orders and decrees so made, and the said Central Trust Company also prays an appeal to the Supreme Court of the United States from the said rulings hereinbefore mentioned to which it excepted as aforesaid, which exceptions are allowed, and this court allows both of the appeals so prayed upon the said appellants filing a bond herein, with sufficient security, to be approved by this court, in the sum of eight thousand dollars, which appeal shall, during the pendency and until the determination thereof, supersede this decree and all enforcements thereof by or on behalf of the said intervenors.

And in like manner from the rulings hereinbefore set forth to which the Dayton, Forth Wayne and Chicago Railroad Company excepted as aforesaid, which exceptions are also allowed, the Dayton, Fort Wayne and Chicago Railroad Company also prays a like

appeal from the orders and decrees so made thereof as provides that the same is without prejudice to any contribution which may be found to be just and proper as to any payment made by any of the purchasers under the provisions of the said orders or realized under any resale made under this order, and this court, while expressing a doubt whether such appeal will lie, nevertheless allows the same, the said appellants filing herein a bond for costs in the sum of five hundred dollars, with sufficient security, to be approved by this court.

And afterwards, to wit, on the 28th day of January, A. D. 1889, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, page 182.

In the matter of the intervening petition of R. S. Grant.

This cause coming on to be further heard on the motion of said intervening petitioner, by his counsel, B. H. Bristow and Bluford Wilson, to require the purchasers of the railroad property heretofore sold under decree of foreclosure and sale in this case to forthwith pay into the registry of this court for the use of the said intervenors the amount due under the said decree entered herein; that in default thereof the said railroad property be resold for the benefit of the intervenor.

And the said intervenor being present by his counsel, and the purchasers of the Dayton and of the Cincinnati Divisions being represented by C. W. Fairbanks, their solicitor, and the Cincinnati & Lebanon & Northern R'y Co., assignee of purchasers at the foreclosure sale of the Cincinnati Northern R'y Co., by Wm. M. Ramsey, its solicitor, and the Dayton, Fort Wayne & Chicago Railroad Company, assignee of the purchasers of the Southeastern Division and of the purchasers of the Iron railroad, by John C. Coombs, its solicitor, and R. D. Marshall, the present receiver of the said railroad company, and the purchasers of the main line, the Toledo Terminal, and the St. Louis Division being present by Clarence Brown, their solicitor, objecting to the jurisdiction of the court, and the complainant, The Central Trust Co. of New York, being represented by Edward Colston, its solicitor;

And thereupon, pending *in* the hearing upon the said motion, comes the complainant, The Central Trust Co. of New York, on the 15th day of March, 1884, — be now heard as a petition for a rehearing of the said decrees of December 22, 1883; or, if that relief be denied, that the same be taken and held to be a bill *or* review or a bill in the nature of a bill of review; or, if that relief be denied, that the said petition be amended and supplemented in certain respects, as stated in a certain paper now read, and be now docketed as an original bill of review as of the 15th day of March, 1884; and, after hearing Edward Colston, the counsel for said complainant, in support of the said motion and B. H. Bristow and Bluford Wilson, of counsel for the said intervening petitioners, in opposition thereto, it is ordered that the said application of the com-

plainant and each part thereof be, and the same is, denied in all respects.

To which ruling and order of the court the said complainant duly excepts.

And thereupon, the court having fully heard the argument of counsel of the respective parties hereto upon the said motion of said intervening petitioner, R. S. Grant, as first above stated, and having fully deliberated thereon, and the court considering that the order entered herein on the 10th day of April, 1884, was void, and that it had been for that reason set aside and ordered to be held for naught by the order entered herein on June 11th, 1887, and that all the orders or decrees entered herein in pursuance of or in execution of the said order of April 10, 1884, were equally void and of no effect so far as the same purports to effect the rights of the said intervenors, and that the decrees entered herein on December 22, 1883, are now in full force and effect as to the locomotives hereinafter mentioned;

And the court further considering that under the said decrees of Dec. 22, 1883, and under said decree of foreclosure and sale herein and the notice of sale given in pursuance of such decree, and under the sale actually made thereunder and the order of this court confirming the said sale, the purchasers of the mortgage division of said Toledo, Cincinnati & St. Louis R. R. sold in this case took the said railway and property subject to the payment of the sum of $8,290.48, with interest thereon from the 1st day of December, 1883, adjudged by the said decree of Dec. 22, 1883, in respect thereto to be due to the intervenor, R. S. Grant, on account of locomotives # 73, and by the said decrees ordered to be paid by W. J. Craig, the receiver, in the manner set forth in said decree of Dec. 22, 1883, to the said intervenor, and also adjudged by the said decree to be a first lien upon the Toledo, Cincinnati & St. Louis railroad, and especially upon the Cincinnati Northern Division thereof;

And the court further considering that the said lien adjudged by the said decree of Dec. 22, 1883, in favor of the said intervenor, R. S. Grant, against the said railroads should be enforced, and also that there should now be enforced the right reserved by this court upon the sale of the Cincinnati Northern Division of the said Toledo, Cincinnati and St. Louis railroad to resell the premises and property so sold in this case upon failure to comply within twenty days with any order of this court directing the purchasers thereof to make such further payment in this case as this court should from time to time direct in order to meet claims adjudged in this case by this court to be prior in equity to the mortgages foreclosed in this case;

And the said intervenor admitting he had already received upon account for the said locomotives # 73, but without prejudice to his rights in the premises, the following sums of money, viz:

The amount of $183.36, paid between Nov., 1885, and Feb., 1886, on account of rentals, and the amount of $3,000, paid Sept. 20, 1887, upon the sale of the said locomotive # 73 to the Havana, Rantoul and Eastern Railway Company;

And that after crediting the amounts so admitted to have been

paid and adjusting the interesest and expenses accounts up to the 12th day of November, 1888, the net amount remaining due and unpaid to the said intervenor on account of the said locomotive # 73 on the 12th day of November, 1888, is the sum of sixty-nine hundred and ninety-five $\frac{75}{100}$ dollars ($6,995.75), and no more, and no one claiming that any other or greater credit should be made upon the said claim:

Thereupon the court orders as follows:

It is now ordered that the purchasers of the Cincinnati Northern Division and their said assignee, the Cincinnati, Lebanon & Northern R'y Co., of the said Toledo, Cincinnati and St. Louis railroad, as being primarily chargeable therewith as between themselves and the said intervenor under the said decree of Dec. 22, 1883, be, and they are, required to pay or cause to be paid into the registry of this court, within sixty days from the 28th day of January, 1889, for the use of the said intervenor, R. S. Grant, the amount of sixty-nine hundred and ninety-five $\frac{75}{100}$ dollars ($6,995.75), with interest thereon from the 12th day of November, 1888.

And it is further ordered that, in default of making of the said payment within the time so limited therefor, the said Cincinnati Northern Division be resold upon request of the said intervenor herein, R. S. Grant, for the payment and satisfaction out of the proceeds thereof of the said sum of $6,995.75, with interest, herein directed to be paid to the said intervenor by the said purchasers.

And it is further ordered that this degree is without prejudice to any right the said intervenors may have to apply for orders to resell other mortgage divisions of the Toledo, Cincinnati and St. Louis railroad for the payment out of the proceeds of such resale any balance of the amount hereinbefore named, to wit, said sum of $6,995.75, not realized upon any sale of the Cincinnati Northern Division.

And it is further ordered that in case any resale of the railroad and property hereinbefore described in this case becomes necessary by reason of default in the payment of said amount hereby ordered to be paid, then such resale shall be made pursuant to the terms of the original decrees for the foreclosure and sale of the said railroads respectively, but by the marshal of this district, who is hereby appointed master commissioner for that purpose, and that leave is given to apply to this court for further directions as to any such sale.

And it is further ordered that this order is and shall be without prejudice to the right of the said Cincinnati Northern Division and the purchasers thereof or any other persons or corporation succeeding to or having their rights in the premises to apply to this and other courts having jurisdiction in the several cases in foreclosure proceedings against the several divisions of the said Toledo, Cincinnati and St. Louis railroad for contribution towards the said amount from said several divisions or the said purchases thereof, or in the event of the payment of the same by said purchasers of said Cincinnati Northern Division to apply for a distribution thereof over and among said other divisions according to the percentage of contribution and distribution applicable thereto as herein and in said other causes of foreclosure has been or may be determined, or to

collect or enforce the payment of said sum by the said Toledo, Cincinnati & St. Louis Railroad Company or out of and against any property thereof, all as the rights not now passed upon but expressly reserved as to such contribution of the said parties purchasers of said respective mortgage divisions and said Toledo, Cincinnati and St. Louis Railroad Company as between each other shall appear and as this court and any other court having jurisdiction in or touching the premises heretofore may have determined or shall order, adjudge, and decree.

And thereupon the said Central Trust Company of New York prays an appeal to the Supreme Court of the United States from the orders and decrees so made, and the said Central Trust Company also prays an appeal to the Supreme Court of the United States from the said rulings hereinbefore mentioned, to which it excepted as aforesaid, which exceptions are allowed, and this court allows both of the appeals so prayed upon the said appellants filing a bond herein, with sufficient security, to be approved by this court, in the sum of five thousand dollars, which appeal shall, during the pendency and until the determination thereof, supersede this decree and all enforcements thereof by or on behalf of the said intervenors.

* * * * * * *

(Record, p. 456 & p. 457.)

And afterwards, to wit, on the 30th day of January, A. D. 1889, the following bill of exceptions was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Bill of Exceptions.

Be it remembered that on the 12th day of November, 1883, at the October term, 1888, of this court, this cause came on to be heard in the matter of the intervening petition of R. S. Grant, and upon his motion, filed herein Nov. 3rd, 1888, for an order directing the purchasers of the railroad and property heretofore sold in this cause to pay into the registry of this court, for the use of said R. S. Grant, the sums found due for a certain locomotive, # 73, as adjudged and decreed by a certain order entered in this cause on the 22nd day of December, 1883, and that in default thereof the said railroad property might be resold under the decrees of this court for the benefit of said R. S. Grant, and for other and further relief, and upon the motion of the Grant Locomotive Works and the American Loan and Trust Co. for an order directing the purchasers of the railroad property heretofore by order of this court sold in this cause to pay into the registry of this court, for the use of said Grant Locomotive Works and said American Loan and Trust Co., the sums found due for a certain locomotive, # 63, as adjudged and decreed by a certain order entered in case # 3578 in this court on the 22nd day of December, 1883, and that in default thereof the said railroad property so as aforesaid heretofore sold in this case (No. 3554) might be re-

sold under the decree of this court for the benefit of the said Grant Locomotive Works and said American Loan and Trust Co., and for other and further relief.

And thereupon The Central Trust Co., complainant herein, by its counsel, prayed the court that these certain proceedings, namely, "petition for rehearing" filed by it in this cause on the 15th day of March, 1884, and a "petition for rehearing," etc., filed by it in case # 3578 in this court on the 15th day of March, 1884, be amended and supplemented, and as amended and supplemented be docketed as an original bill of review as of date March 15, 1884, which said two original "petitions for rehearing" and the same as proposed to be amended and supplemented and docketed as an original bill of review as of said March 15, 1884, are hereto attached, marked Exhibit "A," and made part hereof; upon consideration whereof the court refused to allow said "petitions for rehearing" to be amended or supplemented as above prayed and docketed as an original bill of review as of date March 15, 1884; to which ruling of the court said Central Trust Company, by its counsel, then and there excepted and presented to the court this its bill of exceptions containing all the evidence heard in that behalf, and prayed that the same be signed, sealed, and allowed and made part of the record of this cause, which is accordingly done this 28th day of January, A. D. 1889.

HOWELL E. JACKSON,
Circuit Judge. [SEAL.]

Robert Clarke & Co., Printers, Cincinnati.] [*March, 1890.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1889.

The Central Trust Company
No. 1,277.] vs.
The Grant Locomotive Works et al.

The Dayton, Fort Wayne & Chicago R. R. Co.
No. 1,278.] vs.
The Grant Locomotive Works et al.

The Central Trust Company
No. 1,279.] vs.
R. S. Grant.

The Cincinnati, Lebanon & Northern Ry. Co.
No. 1,280.] vs.
R. S. Grant.

BRIEF FOR APPELLANTS ON MOTION TO DISMISS, UNITED WITH MOTION TO AFFIRM WITH DAMAGES.

STATEMENT OF THE CASE AND OF STEPS TAKEN.

Inasmuch as the appellees have united with their motion to dismiss these appeals for want of jurisdiction, a motion to affirm the decrees from which the appeals are prosecuted with damages, on the ground that the appeals are without merit and frivolous, and for delay only, it becomes necessary to put the court in possession of the facts

involved in the controversy more fully than is done in appellees' brief. The facts necessary to be known are complicated, but an effort will be made to place them before the court in as clear and concise a manner as the subject admits of.

This makes it necessary to give in part the details of five separate suits brought in the Circuit Court of the United States, Southern District of Ohio, Western Division, at Cincinnati, by the Central Trust Company of New York, to foreclose five separate and distinct mortgages made by separate and distinct corporations upon separate and distinct properties, which properties and corporations had been, after the making of said mortgages, consolidated, under the Statutes of Ohio, into a railroad company, called The Toledo, Cincinnati and St. Louis Railroad Company. There are two of the five suits above mentioned with which this controversy has to do in a special manner. The style and docket numbers of these two cases are given exactly; and the importance of this precision will appear as the discussion proceeds. The two cases last mentioned are those in which the decrees were entered in the court below, from which the present appeals are prosecuted. The style below of one of these cases is "The Central Trust Company of New York, a corporation, *v.* The Toledo, Cincinnati and St. Louis Railroad Company, The Cincinnati Northern Railway Company, The Spring Grove, Avondale and Cincinnati Railway Company, and Grenville D. Braman. In Chancery. No. 3,554." The style below of the other case is "The Central Trust Company of New York, a corporation, *v.* The Toledo, Delphos and Burlington Railroad Company, The Toledo, Cincinnati and St. Louis Railroad Company, and Grenville D. Braman. In Chancery. No. 3,578."

The appeals numbered on the docket of this court 1,279 and 1,280 belong to the case numbered in the court below 3,554; but the name of the appellant in appeal No. 1,280 in this court is incorrectly printed in the extracts from the transcript of record furnished us by appellees on this motion as "The Dayton, Ft. Wayne and Chicago Railroad Company." It should be "The Cincinnati, Lebanon and Northern Railway Company." The Dayton, Ft. Wayne and Chicago Railroad Company has nothing to do with the property involved in case 3,554 and in appeal No. 1,280; and it might as well be stated at this point that the notice of motion to dismiss the appeal in 1,280 is addressed only to counsel of The Central Trust Company and of The Dayton, Ft. Wayne and Chicago Railroad Company. Is this sufficient notice to The Cincinnati, Lebanon and Northern Railway Company, which is represented in this appeal by its own counsel, W. M. Ramsey, of the motion to dismiss?

In case 3,578 of the lower court, there were two appeals taken to this court, as in the other case: one by The Central Trust Company, and the other by The Dayton, Ft. Wayne and Chicago Railroad Company. Of these two appeals, that of The Central Trust Company is numbered 1,277, and that of The Dayton, Ft. Wayne and Chicago is numbered 1,278.

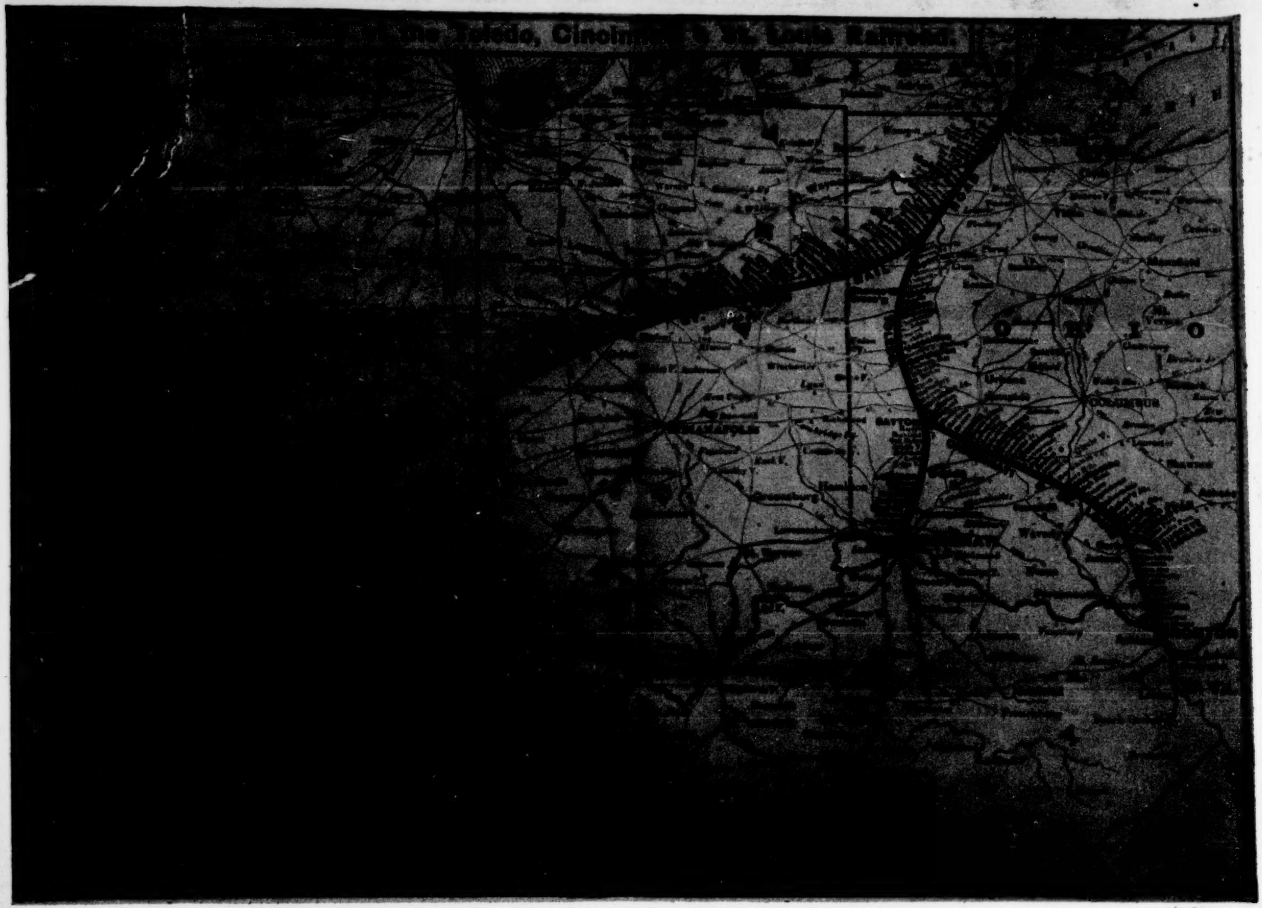
The Cincinnati, Lebanon and Northern Railway Company has become the owner of the railroad sold in foreclosure proceedings in case No. 3,554, and The Dayton, Ft. Wayne and Chicago Railroad Company has become the owner of the railroad sold in the suit No. 3,578.

At the time of the institution of the suits above named in the Circuit Court of U. S., Southern District of Ohio and Western Division, there was a railroad corpora-

tion known as The Toledo, Cincinnati and St. Louis Railroad Company, which owned and operated a line of narrow-gauge railroad from Toledo, in Ohio, southward to Delphos, branching thence south-westwardly through Kokomo, Indiana, to East St. Louis, Illinois, and extending also from Delphos, Ohio, southwardly to Dayton; thence branching south-eastwardly to Ironton, on the Ohio river; and from Dayton, Ohio, branching southwardly to Cincinnati, Ohio, making a total of some miles in length. A diagram [*see opposite*] is inserted for the convenience of the court. It will be necessary to give part of the history of the formation of this consolidated company. For that purpose, we begin with the two main or chief constituent corporations, one known as The Toledo, Delphos and Burlington Railroad Company, and the other as The Toledo, Cincinnati and St. Louis Railroad Company.

The Toledo, Delphos and Burlington Railroad Company was formed in May, 1879, as the product of the consolidation of four railroad companies having roads or the right to construct roads which together would make a line from Toledo, in Ohio, through Delphos, in the same state, to Kokomo, Indiana. This company executed promptly a mortgage upon its railroad line thus acquired, covering the property from Toledo to Kokomo, which mortgage is known in subsequent proceedings as "the main line mortgage."

In June, 1880, this Toledo, Delphos and Burlington Railroad Company (No. 1) consolidated with another railroad company that was authorized to build a line of road from Dayton, Ohio, northward to Delphos, and thence to Toledo. Thirty-two miles of said road had been constructed. The name of the consolidated company thus



produced was the same as the former, Toledo, Delphos and Burlington Railroad Company. This Toledo, Delphos and Burlington Railroad Company (No. 2) executed a mortgage to secure $ of bonds upon the property thus acquired between Dayton and Delphos, covering that part of the road between those two points extending from Third street, in the city of Dayton, to Delphos. This mortgage was foreclosed in action No. 3,577 of the five suits above mentioned.

In March, 1881, another railroad called The Dayton and South-eastern Railroad Company, an Ohio corporation, had built and was owning and operating a railroad from Dayton, Ohio, south-eastwardly through the flourishing towns of Xenia and Chillicothe, to a place called Centre, near the city of Ironton, on the Ohio river. This company was consolidated with The Toledo, Delphos and Burlington Company. The consolidated company, the product of this union, was likewise named The Toledo, Delphos and Burlington Railroad Company. This Toledo, Delphos and Burlington Railroad Company (No. 3) promptly executed a mortgage to secure the payment of of bonds upon the road thus acquired extending from Third street, in the city of Dayton, south-eastwardly to Centre, Ohio, a point within a few miles of the city of Ironton. This mortgage was foreclosed in case 3,578, from which case two of the appeals now before the court are taken.

In the summer of 1881, this Toledo, Delphos and Burlington Railroad Company (No. 3) built a railroad from Dayton, Ohio, in the direction of Cincinnati to a place called Dodds, in Warren county. This was the only piece of railroad this Toledo, Delphos and Burlington Railroad Company ever constructed. As soon as this road

from Dayton to Dodds was constructed, and perhaps before, this Toledo, Delphos and Burlington Railroad Company (No. 3) placed a mortgage thereon to secure the payment of of bonds. This mortgage was foreclosed in case 3,576 of the five cases above mentioned, and is known as the Cincinnati Division Mortgage.

At this time, the Iron Railroad Company was a corporation under the laws of Ohio, which had built a standard-gauge railroad from the city of Ironton, on the Ohio river, northward some eight or ten miles in the direction of Wellston. This road was the next victim of The Toledo, Delphos and Burlington Railroad Company. A narrow-gauge road, not feeling itself competent, perhaps, to swallow a standard-gauge track, it was arranged to lay a third rail on the Iron Railroad to obtain uniformity of gauge. This being done, the Iron Railroad, in October, 1881, was consolidated with The Toledo, Delphos and Burlington Railroad Company (No. 3). As the Iron Railroad Company had anticipated the invader by having already covered its property with an ample mortgage, the usual process of mortgage making by The Toledo, Delphos and Burlington Railroad Company to cover the Iron Railroad was omitted in this instance. The product of this consolidation was likewise called The Toledo, Delphos and Burlington Railroad Company. The mortgage on The Iron Railroad Company was foreclosed in case No. 3,579 of the five cases heretofore mentioned.

It is to be observed that each and every of the several mortgages above named made by The Toledo, Delphos and Burlington Railroad Company was made by a different company of that name and upon separate property and to secure separate bonds, so that the interests and rights under these several mortgages were as distinct as

possible. The importance of keeping this feature prominent will be realized hereafter. Each of said mortgages was made to the Central Trust Company.

It will also be borne in mind that this railroad corporation, known as The Toledo, Delphos and Burlington Railroad Company, had, by this time, absorbed railroads enough to make a continuous line in Ohio from Toledo to Delphos, to Dayton, to Ironton, and to Dodds; and from Delphos to Kokomo, Indiana.

In the meanwhile, a similar process of absorption and consolidation was taking place in the neighboring states of Indiana and Illinois. The name used there to acquire a number of small roads was The Toledo, Cincinnati and St. Louis Railroad Company. That company was originally incorporated under the laws of the State of Indiana. In May, 1881, it acquired rights making a line from Kokomo to the Illinois state line. Passing into Illinois, it acquired, by consolidation, railroads forming a line to East St. Louis. This process of consolidation is marked by the same peculiarity as that pointed out in the case of The Toledo, Delphos and Burlington Railroad Company, viz., that each new company, the product of the consolidation, had the same name as one of the constituents.

This recital brings us to the 23d day of February, 1882, at which time these two chief constituents, The Toledo, Delphos and Burlington and The Toledo, Cincinnati and St. Louis railroad companies, were consolidated under the name of the latter company, thus giving the last-named company ownership and control of a line from Toledo to Delphos, thence south-westwardly to East St. Louis, from Delphos south to Dayton, thence south-eastwardly to Ironton, and from Dayton directly south to Dodds.

The temptation to reach Cincinnati being found irre-

sistible, overtures were now made by this Toledo, Cincinnati and St. Louis Railroad Company to acquire by consolidation the railroad of The Cincinnati Northern Railway Company, a prosperous line forty-two miles in length, extending from Cincinnati to Dodds in Warren county. This consolidation was accomplished June 1, 1883, the company, the product of the consolidation, receiving the name of one of the constituents, The Toledo, Cincinnati and St. Louis Railroad Company. But this line had already a mortgage upon it made by The Cincinnati Northern Railway Company to secure of bonds, which is the mortgage foreclosed in case 3,554, one of the five cases above mentioned, and the case from which the appeals 1,279 and 1,280 are taken.

This appears a convenient place at which to call the attention of the court to the effect, under the laws of the State of Ohio, of the consolidation of one railroad with another, on the rights of prior creditors and lien-holders of constituent companies.

The legislation in Ohio, at the time of the several consolidations herein referred to, is found in section 3379 *et seq.*, Revised Statutes of Ohio. Section 3384 provides, among other things, as follows: *"All rights of creditors and all liens upon property of either of such companies, shall be preserved unimpaired, and the respective companies may be deemed to be in existence to preserve the same."*

So it will be seen that while, by consolidation, all the rights, privileges, and franchises of each constituent company and all the property, real, personal, and mixed, shall be transferred to and vested in the consolidated company, yet such consolidation and such transfer of property and rights would, as to prior lien-holders, be without impairment of their rights, and without let or hindrance to the

prompt assertion of them against the constituent companies, whose existence was expressly continued in order to be answerable to such prior demands. A very learned discussion of this feature of consolidation will be found in the case of *Compton* v. *Railway Company*, 45 Ohio St. 592, where, at page 620, the court said:

"This view is much strengthened by the further provision as to the rights of creditors 'that the respective corporations shall be deemed to be in existence to preserve the same.' How, for this purpose, shall they be deemed to be in existence—as legal entities with, or without, property? Manifestly in the former sense, for the existence of a corporate entity without property wherewith to answer claims against it, would be of no avail to a creditor; a judgment against it would be without fruit. The clause was inserted in the interest of creditors; and the only interpretation that can be of any avail to them, can not be rejected without doing violence to well settled rules of construction. The statute introduces a fiction, much as the praetor did in favor of the creditors of an *adrogatus*, and we see no reason why it was not intended to answer substantially the same purpose. In a suit by a creditor, the company, though in fact dissolved, is to be deemed in existence, and a judgment in his favor, whether against it or the new company, is to be satisfied from the property owned by the old company at the time of consolidation, as if such proceedings were never had; the fact of the consolidation *is pushed aside*, and no one will be permitted to question the fiction until his rights have been satisfied. Of this, no one, as a creditor of the new company, can in justice complain. The lien is a result of the proceedings under which the company acquired its title to the property; and, of it, creditors of the new company have, in law, the same notice they have of prior mortgages upon the same property."

See also *Wabash, St. Louis and Pacific Ry. Co.* v. *Ham*, 114 U. S., at page 595.

The value of these just provisions of the law of Ohio was soon brought forcibly to the minds of the bond holders of the constituent companies consolidated into The Toledo, Cincinnati and St. Louis Railroad Company. Scarcely six weeks had elapsed after the consolidation of the Cincinnati Northern before this consolidated company, The Toledo, Cincinnati and St. Louis Railroad Company, being hopelessly embarrassed, was unable to meet the obligations accumulated by the series of consolidations; and one Grenville D. Braman, having obtained a judgment against The Toledo, Cincinnati and St. Louis Railroad Company, upon some unpaid coupons issued by one of these constituent companies, filed a bill in the Circuit Court of the United States for the Southern District of Illinois, at Springfield, praying that a receiver be appointed to take charge of this entire road of The Toledo, Cincinnati and St. Louis Railroad Company from St. Louis to Toledo, and thence to Cincinnati and Ironton. On the 2d day of August, 1883, Judge Drummond appointed one E. E. Dwight receiver under this bill. A similar bill was filed the next day in the United States Court for the Northern District of Ohio, Western Division, at Toledo, and Judge Welker likewise appointed the said Dwight receiver of the said road, so far as it was within the State of Ohio. The proceeding under and in pursuance of these two bills is known in this connection as "The Braman case." The filing of this bill and the exposure consequent upon it, naturally alarmed the bond holders of the constituent companies, and they forthwith began to assert their rights. The first bond holders to move in that direction were those of The Cincinnati Northern Railway Company. On their

behalf the Central Trust Company, mortgagee of the Cincinnati Northern Railroad, filed a bill in the Circuit Court of the United States, Southern District of Ohio, in case No. 3,554 (already referred to), praying for the foreclosure of the mortgage upon that road and the appointment of a receiver other than Dwight of that property. But as the pendency of the suit known as the Braman case was pleaded in bar of the prosecution of case 3,554, on the ground that the court in the Northern District of Ohio had obtained prior jurisdiction by virtue of the appointment of Dwight as receiver, application was made in the Braman case for leave to maintain and prosecute the bill in question for foreclosure of the mortgage upon The Cincinnati Northern Railway. This application led to an order in the Braman case at Toledo granting permission to The Central Trust Company to prosecute the bill in question. And in addition thereto it resulted in the institution by The Central Trust Company at Cincinnati of cases 3576, 3577, 3578, and 3579, in the Southern District of Ohio, Western Division, to foreclose the several constituent mortgages heretofore mentioned, the court having made an entry in the Braman case setting aside the order appointing the receiver, to be effective at a future date therein named. This was done upon the theory that the allegations of the creditor's bill were not sufficient to justify the court in Ohio in retaining possession of the debtor's property by a receivership.

Each of the five cases above mentioned was a separate suit. Case No. 3,554 was confined to the railroad from Cincinnati to Dodds and to the foreclosure of a mortgage made thereon October 1, 1880, and to the appointment of a receiver for that road belonging to the mortgagor, the Cincinnati Northern Railway Company; in case 3,576 the same

relief was sought as to the road from Dodds to Dayton under a mortgage dated May 16, 1881, made by The Toledo, Delphos and Burlington Railroad Company; in case No. 3,577 the same relief was asked as to the road from Dayton to Delphos under the mortgage of date June 21, 1880, made by another Toledo, Delphos and Burlington Railroad Company; in case 3,578 the same relief was prayed as to the road between Dayton and a point called Centre, near Ironton, under the mortgage dated May 16, 1881, made by the Toledo, Delphos and Burlington Railroad Company; and in case 3,579 the same relief was asked as to the Iron Railroad under the mortgage made by the Iron Railroad Company, August 1, 1881. The Central Trust Company was complainant in all these cases; but the principal defendant, the mortgagor, was different in each case; while the consolidated company and Braman were defendants in all of them. Four of the suits were begun on October 20, 1883, case No. 3,554 having as stated been commenced on the 14th of the preceding August. By a separate entry made in each case William J. Craig was appointed receiver therein October 25, 1883, of the railroad property described in the bill in the case wherein the appointment was made and took possession as such November 1, 1883. True, the entry in such case required the receiver to operate that road "in connection with any other of the constituent roads of the said Toledo, Cincinnati and St. Louis Railroad Company of which he might be appointed receiver;" but at the same time he was directed to keep the accounts of the earnings, income, issues, rents, profits, and expenditures of the road (naming it) separate from the earnings, rents, issues, profits, and expenditures of any other of the constituent roads of The Toledo, Cin-

cinnati and St. Louis Railroad Company. The several railroads were operated in pursuance to these directions.

Thus were created five distinct *receiverships*, each covering different property, each created under different mortgages, made by different mortgagors, securing different sets of bonds. It is true that the same man was receiver in each case, but that does not impair the distinct character of the *receiverships*. Confusion crept in at certain stages of the subsequent proceedings, because of failure to observe the distinctive and separate character of these five suits.

To keep the threads of the narrative even, we will here state that the institution of the five suits above stated was followed by suits by The Central Trust Company in the Northern District of Ohio, at Toledo, to foreclose a mortgage made by The Toledo, Delphos and Burlington Railroad Company on the road from Kokomo to Toledo, which mortgage was called "the main line mortgage," and to foreclose a terminal mortgage at Toledo, and by suits in the Federal Court in Indiana and Illinois to foreclose the mortgage from Kokomo to East St. Louis. In each of these last-named cases, after some delay, W. J. Craig was likewise appointed receiver.

On the 27th of October, 1883, two days after Craig was appointed receiver in the five cases mentioned in the Southern District of Ohio, R. S. Grant, appellee in appeals Nos. 1,279 and 1,280, filed an intervening petition in case 3,554 in the Circuit Court, stating that in March, 1883, being the owner of ten locomotives and tenders, numbered from 67 to 76, both inclusive, he had made a contract with the Cincinnati Northern Railway Company for leasing to it said engines and tenders, and he annexed to his petition a

printed form of said agreement and lease. The petition, after averring the delivery of the locomotives and tenders to the Cincinnati Northern Railway Company, and admitting the receipt of one installment of rent amounting to $18,558.97, and also of three monthly installments of $1,500 each, paid May 10th, June 10th, and July 10th, 1883, making in all a total receipt of $23,058.97, set forth the consolidation of the Cincinnati Northern Railway Company with the Toledo, Cincinnati and St. Louis Railroad Company; and also averred the observance by petitioner of all the covenants on his part, and then alleged that "the *consolidated railroad company* on its part failed so to do, and had made default in payment of the monthly rents due August 10th, September 10th, and October 10th, 1883, and had also made default in the payment of the half yearly interest due October 1, 1883, amounting to $2,160." The petition further averred the appointment of Dwight as receiver of the Toledo, Cincinnati and St. Louis Railroad Company, and that Craig, "under the orders of this court, succeeded to said Dwight as receiver herein." This last was a totally inaccurate statement, as Craig was never appointed receiver of the consolidated company, and was in no proper sense successor of Dwight. The petition then stated that by reason of the defaults aforesaid the petitioner was not only entitled to the immediate possession of the ten locomotives and tenders, but also to the principal of $72,000 of equipment bonds, of which he was the owner, together with the half year's interest, $2,160, already mentioned. A further claim was made in the petition that the locomotives had suffered by use a deterioration in market value, in the seven months, equal to $10,000. This sum, together with the unpaid monthly rentals and half year's interest, stated in the petition to

amount in all to $16,798.33, the petitioner prayed the receiver be compelled to pay, and that for its better security said "sum be adjudged a charge upon all the property of the said *consolidated road*, and especially upon the property of the Cincinnati Northern Railway Company, as ahead of the first mortgage bonds secured by the pledge of said property." It also prayed that the receiver be ordered "to forthwith surrender said locomotives and tenders; and, further, to pay petitioners whatever amount may be found to be due after the sale by him (petitioner) of said locomotives, and the application of the proceeds to the payment of said $72,000 and interest of said equipment bonds, and that said balance be adjudged to have priority over said first mortgage." The mortgage over which this priority was sought, it will be remembered, was executed October 1, 1880, nearly three years anterior to the locomotive contract. It should also be noted that this petition claimed the full contract price of the engines, with interest compounded, and an additional sum of $10,000 for alleged wear and tear, and that the whole be given priority over the mortgage.

On the same day, October 27, 1883, there was filed in case 3,578 in the Circuit Court an intervening petition by The American Loan and Trust Company and The Grant Locomotive Works, jointly, setting forth that on August 1, 1882, the Grant Locomotive Works had made a contract and agreement with the Toledo, Cincinnati and St. Louis Railroad Company for the lease to it of ten locomotives and tenders numbered from 57 to 66, both inclusive, and a copy of the lease and agreement was annexed to the petition. It is averred in the petition that by the terms of the lease and agreement The Toledo, Cincinnati and St. Louis Railroad Company had agreed to pay at the office

of The American Loan and Trust Company, in Boston, $20,000, August 1, 1883; $27,000, August 1, 1884; $27,000, August 1, 1885; $31,000, August 1, 1886; also semi-annually on the first days of February and August of each year a sum equal to the half yearly interest at six per cent per annum on the total amount of unpaid rentals. The breach of contract averred in the petition was failure to pay the $20,000 due August 1, 1883, and failure to pay the semi-annual interest amounting to $3,150 due the same day. The petition then averred the appointment of Dwight as receiver, and that afterward, "under the orders of this court, W. J. Craig, Esq., succeeded to said trust as receiver herein." The petition further stated that the principal sum of $105,000, equipment bonds "Series C," had become due and payable by reason of the defaults aforesaid, and that The Grant Locomotive Works owned $53,000 of said bonds, and that the American Loan and Trust Company owned the remainder. The petition further averred that there was due the sum of $50,804.66 for rent, interest, and repairs, which sum it asked that the receiver be ordered to pay, and that he be ordered also to surrender the ten locomotives and tenders, and to pay whatever amount should be found due after the sale of said locomotives and the application of the proceeds to the payment of the $105,000, with interest in accordance with the terms of the lease and agreement, which balance as well as said sum of $50,804.66 the petition prayed "be ordered and adjudged to be a charge upon the property of said defendant railway company and its constituent companies or upon the proceeds of its sequestration as ahead of the first mortgage bonds secured by said property."

"The defendant railway company," above referred to, was the consolidated Toledo, Cincinnati and St. Louis

Railroad Company; and "its constituent companies" were all of those hereinbefore named, and the first mortgage bonds "secured by said property" were the aggregate of the mortgage bonds on each of the constituent railroads. Why this last petition was filed in case 3,578 rather than in any other of the five cases, or rather than in all of them, is a mystery not yet solved. Perhaps it was due to the fact that the railroad from Dayton to Centre, commonly known after the final consolidation as the South-Eastern Division of the Toledo, Cincinnati and St. Louis Railroad, was the most prosperous of the properties and offered the best security. This petition in 3,578 is found at page 12 of the printed transcript of record in appeals Nos. 1,277 and 1,278. It will be noticed that the respective case numbers are not printed; and there is nothing to show from the printed record, in which of the five cases this petition was filed. The names of the parties plaintiff and defendant, as given in the printed petition, are not a reliable designation of the case, because those names do not correspond with the names constituting the correct title of any of the cases. The petition was nevertheless filed in No. 3,578 and that case alone. The petition of R. S. Grant, filed in 3,554, is found at page 11 of the record printed in appeals Nos. 1,279 and 1,280. There has been the same failure to print the number of the case in which that petition was filed, and the same observations are applicable in regard to its caption and number as are made in reference to the other intervening petition.

Although these petitions sought to subordinate the first mortgages to a very large claim, no notice whatever was given to The Central Trust Company of the pendency of said petition; no process was issued thereon against it.

The only process issued on said petitions was to the receiver, W. J. Craig, a party having no interest whatever in litigating the question of priority among claimants contending for precedence. On December 6th, said Craig filed an answer in case 3,554 to the petition of R. S. Grant, and in 3,578, to the petition of The Grant Locomotive Works and The American Loan and Trust Company. This answer is found printed in the record in 1,279 and 1,280, at page 21, and in the printed record of appeals Nos. 1,277 and 1,278, at page 22. It will be noticed that while the receiver, in the foregoing answers, says that all the locomotives are in his possession as receiver, and are necessary to the successful operation by him of "said road," he could hardly have meant that The Cincinnati Northern Railway needed, in addition to the equipment with which it was successfully operated prior to March, 1883, these ten additional locomotives for forty-two miles of road; or that the road from Dayton to Centre needed for its separate use ten additional locomotives. Doubtless, the receiver meant that these engines were in use interchangeably on all roads of which he was receiver. He does not want these locomotives taken out of his possession. What receiver ever does? He therefore prays that the court will make such order as will enable him to retain the use of the locomotives and protect the rights of the petitioners at the same time. It is to be observed that he does not ask that the bond holders of The Cincinnati Northern Railroad be made to pay for ten locomotives for which that forty-two miles of road had no sort of use. In the master's report made at a subsequent stage of this case, he finds, in reference to this contract with The Cincinnati Northern Railway Company, that, "though nominally made with The Cincinnati Northern Railway Company, it was negotiated by the

officers of The Toledo, Cincinnati and St. Louis Railway Company, just prior to the consolidation of the former into the latter, and with the mutual understanding that the locomotives were procured for the general use of the latter company, some legal question as to the effect of the Illinois Statutes being made a ground for preferring this form of action. The master finds the fact to be in accordance with this statement, and that such locomotives were never the property of The Cincinnati Northern Railway Company, nor intended for use on that road specially." This same master's report finds that The Cincinnati Northern Railway possessed in its own right, at the time of the consolidation, seven locomotives, twelve passenger coaches, etc., and that the same were covered by the first mortgage on that road, and that its rolling stock, upon the consolidation with The Toledo, Cincinnati and St. Louis Railroad Company, was taken possession of by it, but that its identity was not destroyed. One would say that this number of locomotives was sufficient for so short a line of road, and that the receiver, knowing these facts, could hardly have intended to say in his answer that that road needed ten additional engines, making seventeen in all. R. S. Grant and The Grant Locomotive Works are chargeable with knowledge that these ten engines, though bargained for in the name of The Cincinnati Northern Railway Company, were in fact leased to and intended for The Toledo, Cincinnati and St. Louis Railroad Company, the consolidated company. Thus were both of these transactions in fact transactions with The Toledo, Cincinnati and St. Louis Railroad Company; and the answer of the receiver should be construed as referring to the road of that company when he speaks of the engines being necessary for the operation "of the road."

On December 22, 1883, the solicitor who had filed these intervening petitions for R. S. Grant and The Grant Locomotive Works procured to be entered four orders which we regard as very remarkable in many respects. They are here printed *verbatim et literatim:*

The United States of America, Southern District of Ohio, Western Division, ss.

At a stated term of the Circuit Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the court rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of October, being the second day of that month in the Year of Our Lord One Thousand Eight Hundred and Eighty-three, and of the Independence of The United States of America the One Hundred and Eighth.

Present, the Honorable George R. Sage, District Judge.

On Saturday, the 22d day of December, 1883, among the proceedings had were the following, to wit:

The Central Trust Company, of New York, Complainant,
No. 3,554.] *vs.*
The Toledo, Cincinnati and St. Louis Railroad Company, The Cincinnati Northern Railway Co.

IN CHANCERY.

In the matter of the intervening petition of R. S. Grant.

The said cause came on to be heard upon the petition and the answer of the Receiver thereto, and upon the evidence submitted on behalf of said petitioners.

And it appearing to the satisfaction of the court that the receiver has in his possession Grant locomotives numbered seventy-three, and is using the same in the operation of the Cincinnati Northern Railway Company, between Cincinnati and Dayton, Ohio, and that the said locomotive

is one of the ten covered by the agreement of lease set out in said petition, and was acquired by the said railway company under the terms of said agreement, and was so held at the date of the appointment of the receiver herein.

And it further appearing that the present receiver, or his predecessor, took the said locomotive, with its tender, into his possession as such receiver, on the first day of August last, and has had the same in continuous use and possession since that date without having made any payment on account of rental as provided in said indenture of lease or other compensation for the use thereof.

And it further appearing that the said locomotive is, in the judgment of the receiver, necessary to the proper operation of said railway and should be acquired as part of its permanent equipment, and that the value of said locomotive as fixed in said agreement of lease is reasonable, and that the petitioner R. S. Grant the owner of said Locomotive and Tender, is willing upon receipt of the contract price or upon being adequately secured therein, to transfer the title of the same to the receiver.

And the matter being fully heard by the court, and upon due deliberation thereon, it is hereby ORDERED, ADJUDGED and DECREED that the receiver pay to the said petitioner as rental for said locomotive and tender, and in full for all claims for rental, interest and repairs down to the first day of December, 1883, the sum of $770.08 the same being the amount due to said date under the terms of said lease.

And the further sum of $7,520.00 balance in full as purchase money for said locomotive and tender.

And it is further ordered that the receiver pay said several amounts as part of the operating expenses of the said railway out of any money not appropriated for the payment of current labor, supplies and taxes.

And it is further ordered and decreed that the said several amounts with interest thereon at the rate of six per cent from the first day of December, 1883, shall be a charge upon the earnings, incomes, and all the property of the said Toledo, Cincinnati and St. Louis Railroad Co. and especially of the said Cincinnati Northern Railway Co. as ahead of the first mortgage or other bonded debt of said company or either of them; and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of the said railways shall be a first lien thereon, and the said sale shall be made subject thereto.

The United States of America, Southern District of Ohio, Western Division, ss.

At a stated term of the Circuit Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the court-rooms at Cincinnati, Ohio, in said district, on the first Tuesday of October, being also the second day of that month, in the year of our Lord one thousand eight hundred and eighty-three, and of the independence of the United States the one hundred and eighth.

Present, the Honorable George R. Sage, District Judge.

On Saturday, the 22d day of December, 1885, among the proceedings had were the following, to wit:

The Central Trust Company of New York

No. 3,554.] *v.*

The Toledo, Cincinnati and St. Louis Railway Company (Dayton and South-eastern Division) et al.

IN CHANCERY.

In the matter of the intervening petition of R. S. Grant.

The said cause came on to be heard upon the petition, and the answer of the receiver thereto and upon the evidence submitted on behalf of said petitioners.

And it appearing to the satisfaction of the court that the receiver has in his possession Grant locomotives, numbered 67, 68, and 72, with their tenders, and is using the same in the operation of the said south-eastern division of the defendant company's railroad between Dayton and Wellston, Ohio, and that the said locomotives are three of the ten covered by the agreement of lease set out in said petition and were acquired by said railway company under the terms of said agreement, and were so held at the date of the appointment of the receiver herein.

And it further appearing that the present receiver herein, or his predecessor, took the said locomotives into his possession as such receiver, on the first day of August last, and has had the same in continuous use and possession since that date, without having made any payment on

account of the rental as provided in said indenture of lease or other compensation for the use thereof.

And it further appearing that the said locomotives are in the judgment of the receiver, necessary to the proper operation of the said division of said railway, and should be acquired as part of its permanent equipment, and that the value of said locomotives and tenders as fixed in said indenture of lease is reasonable, and that the petitioner R. S. Grant, the owner of said locomotives and tenders, is willing upon receipt of the contract price, or upon being adequately secured therein, to transfer the title of the same to the receiver.

And the matter being fully heard by the court, and upon due deliberation thereon, it is ordered, adjudged and decreed that the receiver pay to the said petitioner as rental for said locomotives, and in full for all claims for rentals, interest and repairs down to the first day of December 1883, the sum of $2,311.41, the same being the amount due to said date under the terms of said lease. And the further sum of $22,560.00 balance in full as purchase money for said locomotives and tenders.

And it is further ordered that the receiver pay said several amounts as part of the operating expenses of the said Southeastern division out of any money not approated for the payment of current labor, supplies and taxes.

And it is further ordered and decreed that the said several amounts, with interest thereon at the rate of six per cent from the first day of December 1883, shall be a charge upon the earnings, income and all the property of the said Toledo, Cincinnati and St. Louis Railroad Company, and especially of the said division prior to the first mortgage or other bonded debt of said railroad or said division thereof and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of the said railroad or said division shall be a first lien thereon and the said sale shall be made subject thereto.

The United States of America, Southern District of Ohio, Western Division, ss.

At a stated term of the Circuit Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the court-room at the city of Cincinnati, O., in said dis-

trict, on the first Tuesday of October, being also the second day of that month, in the year of our Lord one thousand eight hundred and eighty-three, and of the independence of the United States of America the one hundred and eighth.

Present, the Honorable George R. Sage, District Judge.

On Saturday, the 22d day of December, 1883, among the proceedings had were the following, to wit:

The Central Trust Company of New York
No. 3,578.] *vs.*
The Toledo, Cincinnati and St. Louis Railway Company (Dayton and South-eastern Division), et al., Defendants.

IN CHANCERY.

In the Matter of the Intervening Petition of the Grant Locomotive Works and the American Loan & Trust Co.

The said cause came on to be heard upon the Petition, and the Answer of the Receiver thereto, and upon the evidence submitted on behalf of said Petitioners.

And it appearing to the satisfaction of the Court that the Receiver has in his possession Grant Locomotives Numbered 57 to 62 inclusive and 64 to 66 inclusive, with tenders, and is using the same in the operation of the said South Eastern Division of the Defendant Company's Railroad between Dayton and Ohio, and that the said Locomotives are nine of the ten covered by the agreement of lease set out in said Petition and were acquired by said Defendant, The Toledo, Cincinnati & St. Louis Railroad Co., under the terms of said agreement, and were so held at the date of the appointment of the Receiver herein.

And it further appearing that the present Receiver herein, or his predecessor, took the said Locomotives into his possession as such Receiver on the first day of August last, and has had the same in continuous use and possession since that date, without having made any payment on account of the rental as provided in said indenture of lease or other compensation for the use thereof.

And it further appearing that the said Locomotives are in the judgment of the Receiver, necessary to the proper operation of the said Division of said Railway, and should be acquired as part of its permanent equipment,

and that the value of said Locomotives and tenders as fixed in said agreement of lease is reasonable and that the Petitioners are willing, upon the receipt of the contract price or upon being adequately secured therein, to transfer the title of the same to the Receiver.

And the matter being fully heard by the Court, and upon due deliberation thereon, it is *ordered, adjudged* and *decreed* that the Receiver pay to the said Petitioners as rental for said Locomotives and Tenders and in full for all claims for rental, interest and repairs down to the first day of December, 1883, the sum of $21,252.70, the same being the amount due to said date under the terms of said lease.

And the further sum of $78,030 balance in full as purchase money for said Locomotives and Tenders.

And it is further Ordered that the Receiver pay said several amounts as part of the operating expenses of the said Southeastern Division, out of any money not appropriated for the payment of current labor, supplies or taxes.

And it is further *ordered* and *decreed* that the said several amounts, with interest thereon at the rate of six per cent from the first day of December, 1883, shall be a charge upon the income, earnings and all the property of the said Toledo, Cincinnati and St. Louis Railroad and especially of said South Eastern Division prior to the 1st mortgage or other bonded debt of said Railroad or said Division thereof, and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of the said Railroad or said Division shall be a first lien thereon, and the said sale shall be made subject thereto.

The United States of America, Southern District of Ohio, Western Division, ss.

At a stated Term of the Circuit Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the Court Rooms, at the City of Cincinnati, O., in said District, on the First Tuesday of October being the 2nd day of that month in the year of Our Lord One Thousand Eight Hundred and Eighty Three, and of the Independence of the United States of America, the 108th.

Present, the Honorable George R. Sage, District Judge.

On Saturday the 22nd day of December 1883, among the proceedings had were the following, to-wit:—

The Central Trust Company of New York, Complainant, No. 3,578.] *vs.*
The Cincinnati Northern Railway Co. et al.

IN CHANCERY.

In the matter of the intervening petition of The Grant Locomotive Works and The American Loan and Trust Company.

The said cause came on to be heard upon the Petition, and the Answer of the Receiver thereto, and upon the evidence submitted on behalf of said Petitioners.

And it appearing to the satisfaction of the Court that the Receiver has in his possession Grant Locomotives Numbered 63, and is using the same in the operation of the said Cincinnati, Northern Railway Company between Cincinnati, and Dayton, Ohio and that the said Locomotive is one of the ten covered by the agreement of lease set out in said Petition, and was acquired by the Toledo, Cincinnati and St. Louis Railroad Company one of the defendants, under the terms of said agreement, and was so held at the date of the appointment of the Receiver herein.

And it further appearing that the present Receiver, or his predecessor, took the said Locomotive with its tender, into his possession as such Receiver, on the first day of August last, and has had the same in continuous use and possession since that date without having made any payment on account of rental as provided in said indenture of lease or other compensation for the use thereof.

And it further appearing that the said Locomotive is, in the judgment of the Receiver, necessary to the proper operation of said Railway and should be acquired as part of its permanent equipment, and that the value of said Locomotive and Tender as fixed in said agreement of lease is reasonable, and that the Petitioners are willing upon the receipt of the contract price, or upon being adequately secured therein, to transfer the title of the same to the Receiver.

And the matter being fully heard by the Court, and

upon due deliberation thereon, it is hereby Ordered, Adjudged and Decreed that the Receiver pay to the said Petitioners as rental for said Locomotive and Tender, and in full for all claims for rental, interest and repairs down to the first day of December, 1883, the sum of $2361.30 the same being the amount due to said date under the terms of said lease.

And the further sum of $8670.00 balance in full as purchase money for said Locomotive and Tender.

And it is further Ordered that the Receiver pay said several amounts as part of the operating expenses of the said Railway out of any money not appropriated for the payment of current labor, supplies and taxes.

And it is further Ordered and Decreed that the said several amounts with interest thereon at the rate of six per cent. from the first day of December 1883, shall be a charge upon the earnings, income, and all the property of the said Cincinnati Northern Railway Company as ahead of the first mortgage or other bonded debt of said Company; and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of the said Railway shall be a first lien thereon, and the said sale shall be made subject thereto.

The captions of these orders are an important part of them. The orders were entered without knowledge of The Central Trust Company or its counsel, and without knowledge on the part of the bond holders interested either in the Cincinnati Northern Railway or in The Toledo, Delphos and Burlington Railroad. They were directed to be entered by the district judge. It is claimed that J. B. Foraker, Esq., attorney for Craig, receiver, consented to the entering of these orders, and a letter written by him is printed as part of the record at page 23 (Record, 1277 and 1278). A word about the insertion and printing of that letter in this record may not be out of place at this time. The letter, not deemed evidence by appellants was omitted from the transcript sent to Washington. But by means of a subsequent stipulation expressly setting forth

that appellants objected to said letter as evidence or to its being considered by the court, the document was afterward sent up. We are disappointed that when the letter is produced the stipulation showing these objections does not appear with it in the printed record. If, however, that letter be considered by the court, it should be remembered in connection therewith that it was sent from Cincinnati, where the cases were pending, to the district Judge at Columbus, Ohio, 100 miles away. This would show that there was not much opportunity offered for a hearing such as is mentioned on the face of these orders. That a record imports verity may sometimes be a fiction!

Returning to the orders: We direct attention to the fact that two of them were entered in case 3,554 which concerned the Cincinnati Northern Railway alone, and that two others were entered in case 3,578 which concerned only The Toledo, Delphos and Burlington Railroad from Dayton to Centre or Wellston. One of the orders entered in case 3,554 purported to find that the receiver had engine 73 in his possession, and was using the same in the operation of the "said Cincinnati Northern Railway between Cincinnati and Dayton." It should be here recalled that the Cincinnati Northern Railway did not extend to Dayton, but only to Dodds, and that another road intervened between Dodds and Dayton. This order made the price of locomotive 73, with all back rents, a charge upon "the property of the said Toledo, Cincinnati and St. Louis Railroad Company, and especially of the Cincinnati Northern Railway as ahead of the first mortgage of said company or either of them."

The other order entered in the same case, 3,554, is more remarkable. It is headed, "In the matter of the intervening petition of R. S. Grant." This heading follows

immediately after the title of the cause in No. 3,554. The order then states that the case came on to be heard upon that petition and the answer of the receiver and the evidence, and that it appeared that the receiver had at that time in his possession locomotives 67, 68, and 72, and that he was using them "on the south-eastern division of the defendant company's road between Dayton and Wellston, Ohio, and that said locomotives were three of the ten covered by agreement of lease set out in said petition." Note that "said petition" set forth an agreement of lease whereby said locomotives 67, 68, and 72 were sold to the *Cincinnati Northern Railroad Company* upon installments and not to the Toledo, Delphos and Burlington Railroad Company or to the Dayton and South-eastern Railroad Company. This order then directed that said contract price of these engines and some back rent amounting in all to $25,871.41 be a charge upon "the income, earnings, and all the property of said Toledo, Cincinnati and St. Louis Railroad Company, and especially of said division, prior to the first mortgage or other bonded debt of said railroad or of said division thereof, and that any balance remaining due at the date of the foreclosure and sale of said railroad or said division, shall be a first lien thereon, and said sale shall be made subject thereto." This order *was never entered in case* 3,578, although it assumes to create a lien on the property the subject of *that* action. *The property which this order sought to affect was not involved in the case in which the order was entered. Such order was therefore a nullity.* Nor had any petition at that time been filed in case 3,578 relating to these engines. True, an attempt was made subsequently to correct this omission by placing upon the files of case 3,578 such a petition, on June 26, 1884, long after

the orders in question had been entered and set aside. No action was ever taken on said petition.

As to the orders entered in case 3,578 (December 22, 1888):

One of these covered locomotive 63 and the other locomotives 57 to 62 and 64 to 66. The latter nine engines are made a charge amounting to $99,282.70 on "the earnings, income, and all property of the said Toledo, Cincinnati and St. Louis Railroad Company, and especially of said south-eastern division, prior to the first mortgage and other bonded debt of said railroad and said division thereof, and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of said railroad or said division shall be a first lien thereon, and said sale shall be subject thereto." (Page 26 printed record in appeal 1,277.)

Locomotive 63 is made a charge amounting to $11,031.30 upon the earnings and property of "the said Cincinnati Northern Railway Company ahead of the first mortgage or othor bonded debt of said company." (Page 25 printed record in appeal 1,277.) This entry purported to be made upon the petition of The Grant Locomotive Works, which was not filed in case 3,554 until six months afterward, June 26, 1884. Locomotive 63 was one of those not sold to the Cincinnati Northern Railway Company, but to the Toledo, Cincinnati and St. Louis Railroad Company. Moreover, the entry being made in case 3,578, could not in any manner affect The Cincinnati Northern Railway Company. Such order was void as to that railroad; and was ineffectual to bind the property in case 3,578, because it did not purport to do so. (Page 24 printed record in appeal 1,277.) It may be further stated that while these four orders purport to enforce contract

relations, yet engines 67, 68, and 72, which, by the contract, were sold to The Northern Railway Company, are made a lien on the property of *another company;* and engine 63, sold to the Toledo, Cincinnati and St. Louis Railroad Company, is made a lien upon the property of The Northern Railway Company. The confusion and irregularity which accompanied the drawing and entering of these orders, indicates they were made in haste, without deliberation and without the knowledge of the complainant, The Central Trust Company. The fatal irregularity of entering the decrees as to engines 63, 67, 68, and 72 in the wrong cases, is claimed by appellees (appellee's brief, pp. 26–27) to have been cured by the decrees entered June 11, 1887 (p. 83 record in 1,277), and by decrees of January 28, 1889 (id., p. 84).

But this can not be so. These decrees simply enforce the orders of December 22, 1883, and perpetuate whatever vice is in them, without correction. The decrees of January 28, 1889, directing the resale of the Toledo, Delphos and Burlington Railroad from Dayton to Wellston, called in the decree the "south-eastern division," to realize the price of engines 57, 68, and 72, was not entered in case 3,578, but in case 3,554, thus preserving the original defect. And the decree for resale of The Northern Railway for the amount due for engine 63 is entered in case 3,578. (Page 88 of record printed in appeals 1,277 and 1,278; page 81 of record printed in appeals 1,279 and 1,280.)

All proceedings printed in appeals 1,277 and 1,278 are in case 3,578, and those printed in appeals 1,279 and 1,280 are proceedings in case 3,554. The right of resale reserved in the decree of foreclosure and sale in case 3,554 was to satisfy only claims *in that case* adjudged to have priority

over the mortgage foreclosed in that case. (Page 33 at top printed record in 1,279.)

The amount due for engines 67, 68, and 72 has never been adjudged in case 3,554 to be a lien prior in equity to that mortgage. The adjudication of the so-called decree of December 22, 1883, was that the amount due for those engines should be a lien ahead of the mortgage on the Toledo, Delphos and Burlington Railroad, foreclosed in 3,578. The same is true *mutatis mutandis* of the so-called decree of December 22, 1883, covering engine 63 entered in case 3,578, purporting to make the amount due thereon a lien ahead of the Cincinnati Northern mortgage. The amounts claimed in said decrees to be due for these four engines are not within the terms of the reservation of the right to resell.

The Central Trust Company remained in ignorance of these so-called decrees of December 22, 1883, until the 26th of February, 1884, when the fact of their existence was brought out in the course of a hearing given by the judges of the sixth and seventh circuits, of all rolling-stock owners having claims against the entire system, many of whom, by that time, had filed intervening petitions in all the cases. Thereupon, notice was immediately given in open court to the solicitor of R. S. Grant and The Grant Locomotive Works, that application would be at once made to set aside these orders. In pursuance of said notice, the first step taken was to cause entries to be made in cases 3,554 and 3,578, March 7, 1884, suspending the alleged decrees of December 22, 1883 (pp. 27, 28, printed record in 1,277). This was followed by the filing in each of said cases, on March 15, 1884, by The Central Trust Company, of a proceeding entitled "petition for rehearing, etc." (id. p. 36). To appellees' claim (brief, p. 22) that the petition was unlawful and

must be entirely disregarded, it is to be said that the allegations contained in the petition are entirely sufficient and appropriate for a bill of review, and that the petition asks that it be taken as a bill of review, if necessary to accomplish justice, to meet a possible doubt then felt on the part of the complainant whether the so-called decrees of December 22, 1883, were merely interlocutory. Names go for nothing, and the court will consider this petition to be a bill of review if the allegations are sufficient and the circumstances warrant. *Ut res magis valeat quam pereat.* To the further claim that no process was issued thereon, it is to be said that none was needed, as R. S. Grant and The Grant Locomotive Works appeared voluntarily and resisted the hearing of the so-called petition, by one of the same counsel who represents them here, who was heard at great length, both orally and on written brief. As a result of such proceeding, the so-called decrees of December 22, 1883, were set aside by orders entered April 10, 1884 (p. 41, record 1,277). These orders were entered upon the hearing of the petition of The Grant Locomotive Works and of R. S. Grant, and the court found that the so-called decrees of December 22, 1883, were entered without notice to the complainant, and without any proof, and that the decrees are erroneous and unjust to the bond holders and to the complainant, that they were unauthorized and were based upon a misrecital of the facts, and that they were entered by the court without any examination, in the erroneous belief entertained by the court at the time that all parties in interest had assented to them. Such finding was made after a full and elaborate hearing and attempted explanation by Grant of all the circumstances attending the entering of the so-called decrees of December 22, 1883.

The court then proceeded to determine the questions

arising upon the intervening petition of R. S. Grant and The Grant Locomotive Works, granting them relief to the extent of compensation for the use of engines by the receiver, and compensation for deterioration in value of the same by use, and granting the petitioners leave to retake said engines wherever they might be found in the possession of the receiver, and giving leave to petitioners to apply at any time for additional orders. The determination of the amount of compensation was postponed until the coming in of the report of the master, Jacob D. Cox, appointed under the order made five days before (April 5, 1884), to inquire and state to the court the amount of rolling stock, engines, cars, and equipment belonging to the several corporations, mortgagors in the five cases herein mentioned, at the dates of the mortgages sought to be foreclosed in said suits; and as to what would be to the owners a fair and just compensation for past and future use thereof; and what, if any, deterioration or loss the rolling stock had suffered between the date of its delivery and the appointment of a receiver in said several cases, and what since his appointment. The hearing before this master was proceeded with immediately, and among other intervenors who appeared before him for that purpose were The Grant Locomotive Works and R. S. Grant to claim compensation for use and deterioration of the engines now in question. True, they claimed to do this under protest, but that is immaterial. The report of this master was made June 26, 1884, and he found that $160 per month and $1,000 per engine for repairs would be a fair compensation for use and deterioration. Among other findings is the following: "It was claimed before the master, on behalf of The Grant Locomotive Works (intervening petitioners), that the demand alleged to be made by them for the im-

mediate return of certain locomotives of The Massachusetts Car Trust Series C. & F., made the refusal of the receiver to surrender them a conversion, on which they have a right to recover from the receiver, and out of the proceeds of the sale of the road, the full value of such locomotives at the time of such alleged conversion. The master finds that the nature of the contracts referred to above, the equity of redemption on the part of the vendor, the rights of the holders of the equipment bonds under such contracts, and the interest of mortgagees of the railroad and general creditors, and the subject-matter of such contracts, all make the intervention of the court as a court of equity a necessity to determine the rights and to marshal and enforce the liens of parties, and that the possession of the *res* by the receiver as the officer of the court, *pendente lite*, is neither a conversion nor an unlawful withholding of possession. He is, therefore, unable to report in regard to said locomotives, any other or different rule of damages from that herein applied to the rolling stock included in said car trust."

The decree for sale of the Northern Railway had been previously entered March 29, 1884, and a like entry to sell The Toledo, Delphos and Burlington Railroad from Dayton to Wellston was entered March 31, 1884 (p. 28, record in 1,277). The latter sale was made June 28, 1884 (p. 44, record in 1,277). The sale of the Northern Railway was postponed, and did not take place until a year afterward. The sale of June 28, 1884, was confirmed July 18, 1884 (p. 46, record in 1,277). At these sales, the rolling stock in question here was not sold, nor was it ever taken into possession by any of the purchasers.

Exception having been taken to the Master's report

by the complainant, The Central Trust Company, as to the amount of compensation for the use of engines and deterioration thereof, were heard November 12, 1885 (p. 61, record in 1,277). At that hearing, The Grant Locomotive Works and R. S. Grant were present, and prayed appeals to the Supreme Court of the United States from an order of court reducing the amount of compensation for use from $160 to $115 a month.

February 8, 1887, nearly three years after these so-called orders of December 22, 1883, were set aside, and after the road sold in foreclosure had gone into new hands, and new rights had attached, and after the death of the circuit judge, R. S. Grant and The Grant Locomotive Works filed petitions setting forth with great detail nearly all the prior occurrences in the five cases mentioned, asking that the rescinding orders of April 10, 1884, be set aside, and the orders of December 22, 1883, be restored.

To this petition, The Central Trust Company was brought in by rule, and a hearing was had which resulted in the order of June 11, 1887 (p. 83, record in 1,277), setting aside the orders of April 10, 1884, and restoring the orders of December 22, 1883. Although the Central Trust Company prayed an appeal from this order of June 11, the same was not prosecuted, as its counsel was satisfied such appeal would be premature, and that the proper time to appeal would be when the orders of December 22, 1883, were attempted to be enforced, which time has now arrived.

In November, 1888, a motion was filed in case 3,554 and in 3,578, by R. S. Grant and by The Grant Locomotive Works, respectively, for an order to resell The Cincinnati Northern Railway in pursuance of the power reserved in the order of sale thereof, to satisfy the amounts of the

two decrees of December 22, 1883, entered in that case; and a like motion to resell The Toledo, Delphos and Burlington Railroad in pursuance of the power reserved in the foreclosure sale thereof, to satisfy the amount of the orders of December 22, 1883, entered in that case. These motions resulted in the decrees now appealed from.

This completes a statement of the proceedings in the five cases as far as the same are necessary to be known, in order to acquire an intelligent understanding of the nature and merits of these appeals; and if comment has at times crept in with statement, it is because we thought it necessary for clearness.

AS TO THE MOTION TO DISMISS THE APPEAL OF THE CENTRAL TRUST COMPANY.

The point is made by appellees that neither The Central Trust Company nor any bondholders, nor the purchasers at judicial sale nor their assignee, can appeal from the decrees of January 28, 1889, for want of interest in the subject. The result of this would be that no one can appeal from those decrees, and hence their correctness is unassailable. This, if true, would be, though summary, yet a convenient disposition of the matter for appellees. That such is the result of the claim made by appellees ought to satisfy them of its unsoundness.

To show that The Central Trust Company can not appeal, the appellees cite the case of *The Farmers' Loan and Trust Company* v. *Waterman*, 106 U. S. 265, to show that The Central Trust Company has not sufficient interest to maintain the present appeals. We think the case cited has

no application to this one, and this can readily be shown. In the case cited The Farmers' Loan and Trust Company had caused a provision to be inserted in the decree of sale directing that the property be sold expressly subject to the claims that were asserting their priority over the first mortgage. The railroad was sold and bought on those express conditions and on such terms was confirmed to the purchasers. It will thus be seen that The Farmers' Loan and Trust Company did not pretend by the sale made to confer upon the purchasers a title free of the claims in question in the case. But on the contrary, by selling the railroad expressly subject to these claims, the purchasers took on the one hand the burden of their priority and on the other the benefit of their defeat. The Farmers' Loan and Trust Company ceased to be concerned thereafter. It rid itself of all responsibility for those claims by the terms which it procured to be inserted in the order of sale, done doubtless for that purpose; and the responsibility of those claims was assumed by the purchasers in exoneration of the trustee. Under such circumstances the Supreme Court well said, page 270: "The Trust Company by consenting to the decree ordering a sale subject to the back-pay and supply liens, in effect voluntarily abandoned that part of the litigation and left it to be carried on thereafter between the several claimants and purchasers alone."

But The Central Trust Company has never abandoned its resistance to these unjust orders of December 22, 1883. It did not turn that contest over to the purchasers at judicial sale to be fought out by them. The purchasers by their purchase succeeded to no such *damnosa hereditas*. The decree for sale entered March 31, 1883, provided that of the purchase price bid $20,000 should be paid in cash,

and that as much more of said bid should be paid in cash as the court should from time to time require in order to meet claims which it might adjudge in that case to be prior in equity to the first mortgage, the court reserving the right to resell in case such calls were not paid within twenty days. The decree further provided that the balance of the bid not paid in cash might either be paid in cash or that the purchaser should have the right to satisfy his bid in whole or in part by paying over and surrendering the first mortgage bonds of The Toledo, Delphos and Burlington Railroad Company and overdue and unpaid coupons belonging thereto (p. 35, record in 1,277). The decree further provided that the funds to arise from the proceeds of of sale should be applied: 1. To pay costs, etc. 2. To pay claims adjudged to have priority over the first mortgage in that case. 3. To the payment of the first mortgage bonds.

The purchasers could not be required to pay *at all events* such claims as should be adjudged to have priority over the first mortgage, as was the case in *The Farmers' Loan and Trust Co.* v. *Waterman*. The purchasers in the present case were required to pay only to the extent of their bid, and could not be compelled to pay in excess of it. When the purchasers' bid was made and accepted, the extent of their liability was thereby determined. The question of priority is one pertaining to distribution, in which the trustee is certainly vitally interested. Moreover, every cent which these purchasers have to pay in cash diminishes the value of the bonds which the trustee is protecting. The reservation of the right to resell, made in the decree for sale, creates merely a lien upon the property sold in the hands of the purchasers. The Trust Company is the trustee for the holders of the bonds covered by the mortgages foreclosed. By the sale the bid of these purchasers is substituted

for the property mortgaged. In effect, the court acts only as agent of the trustee in enforcing compliance by the purchasers with their bid. If the purchasers had chosen to pay into court the full amount of their bid in cash, such course would have been a complete defense to any claim against the railroad, such as is now asserted, and would discharge the road sold from the lien created by that reservation of the right to resell. In the event such payment of cash into court had been made, the entire fund would have been distributable to the bond holders represented by The Trust Company if there were no prior liens to satisfy.

But the *fund* would have continued liable for payment of claims adjudged in the same case to be prior in right to the first mortgage bonds. Clearly every dollar taken from the fund to pay such prior claims would by so much reduce the amount distributable to bond holders; the duty of The Trust Company being to the bond holders first, obviously it must use every endeavor to keep intact the fund out of which its *cestuis que trustent* are to be paid. In the present case, the purchasers, being themselves bondholders, chose to discharge their bid partly in cash and partly in bonds. Under the terms of the decree of sale, the value at which bonds could be received in payment depends entirely on the amount that may be required to pay claims prior in right within the terms of the decree of sale. The greater the amount of cash required, the smaller the value of the bonds. If it be assumed that the purchasers owned all of the bonds, surely it was the duty of the trustee to reduce as far as possible the loss thereon, by the resistance of all claims whose establishment, by requiring the payment of more cash, would *pro tanto* render the bonds less valuable. If the purchasers owned only part of the bonds, it was a duty the trustee owed the bond holders to see that

the cash distributable among their bonds should not be exhausted in payment of claims alleged to be prior in right.

By the terms of the decree of sale, bonds were receivable in payment of bid "at such price or value as would be equivalent to the distributive amount the holders thereof would be entitled to receive thereon in case the whole amount of bid were to be paid in cash." This fixes the maximum value of the bonds, the mortgagors being insolvent.

"The distributive amount, . . . in case the whole amount of the bid were to be paid in cash," would be the difference between the bid and the amount of prior claims divided by the number of bonds. The greater the amount of prior claims, the less dividend on the bonds. And to defeat such prior claims, and thus to preserve the fund intact for the bondholders, is the plainest duty of the trustee. Wherever a duty is imposed, a right arises to perform it. In legal contemplation, the entire amount of the bid, under the terms of this sale, is in the custody of the court, because by the terms of the sale it may be brought in. The application of appellees is for payment out of this same fund. They ask that a further payment of cash on account of the bid be paid into court, and by the court distributed to them, which, if done, takes just so much from the bond holder's pocket. There is therefore no room for the presumption mentioned in appellees' brief (page 19) that, because four years have elapsed since the sale, all the purchase price must be presumed to have been paid into court, and to have been distributed. Since it is only out of this purchase price petitioner's claims can be satisfied, if the purchasers have in truth paid the purchase price, their property is no longer answerable to appellees;

whose only recourse in that event would be against the original corporation with which they contracted by the agreements of lease for the sale of their locomotives.

It must be remembered that the railroads in question were sold without including these locomotives, and that they never went into the hands or possession of the purchasers. At the time the railroads were sold, the decrees of December 22, 1883, had been annulled at the instance of the Trust Company, and the only claims of the petitioners, R. S. Grant and The Grant Locomotive Works, then known to be pressing, were claims for compensation for the use of and for deterioration in market value of these locomotives. The Trust Company put the railroads to sale with an adjudication of the rights of these intervenors conspicuous upon the records. (Order of April 10, 1884, page 41, record in 1,277.) That adjudication expressly denied the right of the intervenors to have the original contract price of their engines adjudged to be a claim prior in equity to the first mortgage. Can it be said that, when a sale has been made under such circumstances, the trustee has no interest in seeing that the integrity of the sale is preserved? Moreover, when these intervening petitioners began their present movement by filing in these cases the petitions of February 8, 1887, resulting in the decrees now appealed from, they caused orders to be entered in the Circuit Court of the United States requiring The Central Trust Company and the purchasers to appear on or before a day named to show cause why the relief prayed for by said petitioners should not be granted. (p. 48, record in 1,277.)

It is therefore with but poor grace that they should be heard to say at this day that they brought into court to

resist their contention, parties who had no interest in opposing it.

We submit that it is clear that The Central Trust Company is interested in the prosecution of these appeals, and that the motion to dismiss the same for want of such interest ought to be denied. And we further submit that the motion to dismiss shows no color of right.

AS TO THE APPEAL OF THE DAYTON, FT. WAYNE AND CHICAGO RAILROAD COMPANY.

It is claimed by appellees that this railroad company, as assignee of the purchasers at judicial sale of the road sold in case 3,578, now ordered to be resold by the decrees herein entered January 28, 1889, upon failure of purchasers to pay the amounts called for in said decrees, has not such interest as will enable it to maintain this appeal.

They cite the case of *Swan* v. *Wright's Executor*, 110 U. S. 590. It is clear, however, that that case does not control this one. Under the decree in the case cited, Swan, the appellant, had no standing in court to review the judgment subject to which, by express agreement, he had purchased the property at a stipulated sum. By his purchase, he had obtained the property for a less sum than he could otherwise have bought it for. If the prior claim which Swan attacked by his appeal had been set aside, the circumstances were such that the benefit thereof ought to have accrued to the bond holders and not to Swan.

The decree in *Swan* v. *Wright* provided that the sale should be subject to all liens that had been or might be established as liens prior to the mortgage as the result of

references theretofore made or then pending; that $300,000 of the purchase-money should be paid as earnest, under the decree, and be subject to the order of the court, and, upon confirmation of the sale to be made under the decree, the purchasers should be invested with good title, subject, however, to what might remain unpaid of the claims and liens established as prior and superior to the first mortgage (p. 595). The amount bid at the sale was $600,000. The sale was reported April 3, 1887, to Swan as purchaser. The report of the master sustaining Wright's claim as a lien prior to the mortgage was made April 7, 1877, four days after the sale.

June 13, 1877, Swan, in his capacity of purchaser, appeared in the case and opposed the confirmation of the report of the master establishing Wright's claim. His opposition, however, was not sustained, and the report of the master was confirmed. Two days after this the sale of the railroad was confirmed, and a deed was made of the railroad to Swan, which, on its face, made the railroad subject to all claims which the court had established as paramount to the first mortgage. This would include the claim of Wright, as the priority of that claim had been established by the court but two days before the acceptance of the deed.

Swan, having sold his railroad, perhaps at an advance, began a suit to have the claim of Wright set aside upon the ground of fraud (p. 597). His case was dismissed by the court below, because, by the confirmation, Swan had practically agreed to pay the debt he was now seeking to destroy. He had practically gotten credit for the face of that claim in his purchase of the railroad, by being able to buy for that much less. Moreover, when the court confirmed Wright's claim, in opposition to Swan's objection, the latter made no motion to have the sale of the railroad

of which he was purchaser set aside, but took the property. Such act on his part was clearly a waiver of the right to object in any other form to the correctness of Wright's claim. The view of the transaction taken by the Supreme Court was that Swan had bought the railroad expressly subject to the lien in question (p. 598). At page 599 the court said: "So that, as respects these claims, purchasers were explicitly warned that they must buy the property and take title thereto subject to their future allowance by the court. That warning was as distinct as if the claims had been specifically described in the decree by the names of the parties prosecuting them, and although Swan has conveyed the property to the Alabama Great Southern Railroad Company, not only without covenants of warranty, but with a clause in the deed distinctly declaring that it shall not be construed 'to express or imply any covenant' by him, he now asks the court to recognize his right, as purchaser, upon newly discovered evidence, to show that the lien established on behalf of Wright's estate ought not to have been recognized. When his assignors or vendors purchased, they knew, or by inspection of the record, could have known of the pendency of the Wright claims. Before the sale was confirmed, the court declined to permit him, as purchaser, to reopen the dispute as to those claims. He made no suggestion that he purchased in ignorance either of their existence, or of the reservation by the court of its right to establish them as superior liens upon the property; nor that they had allowed larger amounts than originally contended for, nor did he ask, in view of their allowance, that he be permitted to surrender his purchase, so that the property could be sold for the benefit of those having first liens. On the contrary, without objection from him, the sale was

confirmed, upon the condition, explicitly declared in the order of the court, that the purchaser bought subject to all liens of the character described in the decree of sale, and that such subordination of his and their rights should be expressed in the conveyance to him."

Again the court said (page 600), speaking of Swan: "He here proceeds upon the assumption that while asserting title in himself, under and by virtue of the decree of sale, he may claim the aid of a court of equity in repudiating the essential condition upon which he received title; and that too without offering or being in a condition to offer a return of the property, in which contingency —the Wright claims being disallowed—it might be resold for the benefit of the bondholders unincumbered by these claims."

And at page 601, the court further said: "All that we decide is, that in view of the express terms of the decree of sale, and since neither the purchaser nor the grantee proposes to surrender the property to be resold for the benefit of the party concerned, such purchaser has no standing in court for the purpose of re-litigating the claims expressly subject to which he bought and took title."

In the present case, the difference in the circumstances is very distinct. The purchasers of the railroad in the present case did not buy subject to the decrees of December 22, 1883. At the time of the purchase those decrees were dead and thought to be beyond resurrection. It seems clear that the purchaser buying under such circumstances, ought to have the right to resist their re-appearance.

Under the terms of sale in the present case, the purchaser takes the property subject to no claims whatever. He agrees to pay his bid, and that is the end of it. The

court has given him a right to pay a certain portion of the bid in bonds. But in whatever way the payment of the purchase price may be made, the purchaser, upon compliance with his bid, takes a clear title. Under the terms of this sale, the right reserved to resell upon failure to pay calls for cash made within the limit of the bid to satisfy the character of claims covered by the terms of the reservation, operates as a lien upon the corpus of the railroad, and those who have acquired, by assignment, the ownership of that railroad from the purchasers at judicial sale, have the right to be heard when such lien is sought to be enforced by resale.

Williams v. *Morgan*, 111 U. S. 697–8.

We submit that the motion to dismiss this appeal should be overruled, and that it shows no color of right.

MOTIONS TO AFFIRM DECREES WITH TEN PER CENT DAMAGES.

Appellees claiming that there is color of right to the dismissal of the appeals on the ground that neither the Central Trust Company nor the purchasers of the railroad has sufficient standing in court to maintain an appeal, now ask an affirmance of the decrees below, in case their motion to dismiss be denied. The motion to affirm is based upon paragraph 5, rule 6, which authorizes such motion where it is manifest the appeal is taken for delay only. The appellees claim that these appeals are manifestly for delay only. The reasons they give for the claim are that the decrees of January 28, 1889, were " merely decrees to

carry into effect the former action of the court, which decrees it will appear are now incontestable by any one in any forum, and are in absolute force and effect." (Appellees' brief, page 21.)

But whether the decrees of December, 1883, are "in absolute force and effect," is the question. The contention of appellants is that they were annulled by the subsequent decrees of April 10, 1884, and that it was error in the court to enforce them nearly five years after the property had been bought on the faith of what had occurred before sale and without notice given at the sale or at the confirmation thereof, that the pretended decrees would be further asserted. So that the real question on these appeals is, "Were the decrees of December 22, 1883, final, and was it beyond the power of the circuit judge to set them aside at the next term of court upon discovering that they had been entered without any evidence, without a hearing or adjudication, or any attempt at an adjudication, but upon the consent, as was supposed, of all parties in interest, but who, in fact, had not so consented?"

Our contention is that under such circumstances the court had the right to rescind the orders and to substitute therefor, as it did, other orders giving the intervenors such rights as they were entitled to in law and equity, being the same rights granted to other owners of rolling stock in use upon these roads under contracts similar to those made by Grant.

But the intervenors, not satisfied with the application to themselves of the principle that equality is equity, sought an advantage by means of the decrees in question. They were not entered upon issue tendered to any party having an interest in resisting the claims of the petitioners. The receiver alone was directed to answer the petitions. This was a matter within

the control of the petitioners, as the practice, in matters of intervening petitions in foreclosure cases, is for intervenors to obtain an order against the proper party to show cause why the relief asked for should not be granted. It is idle to speak of the receiver as representing the complainant in the cases below in any claims upon the property adverse to the complainant. The receiver is not a party to the suit either in his official or individual character.

He is, as termed in Justice Blatchford's opinion in *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 469, "the executive officer of the court, intrusted with all the properties committed to his charge, to use and preserve them under the direction of the court for the benefit of all parties in interest." But a receiver has nothing to do with the question of priority as betweeu parties to the litigation. They litigate for themselves. Those matters have not been intrusted to his keeping. A decree is a solemn judgment of the court between the parties, pronounced upon issues made. It is the judicial ascertainment and declaration that the one party or the other has established or failed to establish the right asserted. That an order to a receiver to purchase supplies may, in the first instance, be made *ex parte* is not denied; but in such cases such order will be modified or rescinded, upon proper showing by the parties adversely interested. To the claim that these orders are decrees in the judicial sense of the term, it may be answered upon the authority of *Washington Railroad Co.* v. *Bradleys*, 10 Wall. 299, that they are void. In that case, among other things, the court said, at page 303: "It is hardly necessary to repeat the axioms in the equity law of procedure, that the allegations and proofs must agree, that the court can consider only what is put in issue by the proceedings; that averments without proofs and proofs

without averments are alike unavailing; and that the decree must conform to the scope and object of the prayer, and can not go beyond them."

But if this order is to be treated as a direction to buy property, such direction would not be a decree in the judicial sense of that term. And as in all cases of alleged contract for purchase of property, there being a dispute as to the existence of the contract, that dispute can be settled only by litigation. The court made the entries in December, 1883, but shortly thereafter a solemn declaration was entered upon its records by the circuit judge and district judge who made the entries to the effect that the preceding orders of December 22, 1883, had been entered under misapprehension. It may be inferred from what the court declared that it was either a case of fraud, accident, or mistake, or possibly all combined. So that at this date we have merely the allegation of the intervenors that a contract was made through the receiver with the court. The production of entries is evidence thereof, but such orders do not show that the intervenors agreed to waive any title or claim to the rolling stock upon the making of the orders, but only that "they were willing to do so upon being paid."

But it is insisted by the petitioners that these orders of December, 1883, were final decrees in the judicial sense of that term, and that the subsequent orders made by Judge Baxter, April 10, 1884, whereby the December orders were expunged, are nullities and must be disregarded. The petitioners claim that the power to make the April orders depends upon whether the December entries were final. They claim these orders are final; upon this point we take issue.

Whether a decree in equity made in the Circuit Court

of the United States is final depends upon whether an appeal would lie therefrom to the Supreme Court.

Appeals to the Supreme Court are allowed from "all final entries of any Circuit Court." (Revised Statutes, sec. 692.)

The decisions of the Supreme Court, from an early date to the present time, have been frequent wherein the question was discussed and decided as to what constitutes a final decree. In the earlier days the Supreme Court was more inclined than it is at the present time to entertain appeals from orders below that were not strictly final in their character. A more rigid rule is now adhered to.

In *Forgay* v. *Conrad*, 6 How. 204, the Supreme Court said:

"And when the decree decides the right to the property in contest, *and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried into immediate execution*, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.

"This rule, of course, does not extend to cases where money is directed to be paid into court, or property to be delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the court, *or to cases of a like description.* Orders of that kind are frequently and necessarily made in the progress of a cause."

In the case cited the appeal was taken by a party against whom and others a bill had been filed to set aside a conveyance of real estate on the ground of fraud, resulting in a decree adjudging the deeds void, and directing the party appellant to convey the land to complainant. Ap-

peal was taken from that part of the decree commanding the reconveyance of the property. The decree appealed from proceeded to direct that accounts be taken to ascertain the amount of mesne profits for which the fraudulent vendee should be held liable. Upon a motion to dismiss the appeal it was contended that the order or decree was not final, and could not be final until after the master's report came in and had been passed upon by the court. The Supreme Court, to this suggestion, said that if appellants were required to wait for the report of the master they would be subjected to irreparable injury, because the lands and slaves, which they claimed, would be taken out of their possession and the proceeds distributed among creditors of complainant before they could have an opportunity of being heard in defense of their right. The right of appeal in the case cited was based solely upon the fact that the decree below involved an immediate transfer of title, and that irreparable injury occasioned thereby would be sustained by appellant if not allowed to appeal. So that to warrant an appeal, if the decree be not final in all respects, it must at least have the effect of operating to transfer title or produce irreparable injury, if appeal be not permitted.

It is easy to see that the December orders could not have any of the effects which were regarded in *Forgay* v. *Conrad* as sufficient to give the foundation for an appeal. At the date of these orders the locomotives were already in possession of the receiver. That officer took possession of the same by virtue of his appointment as receiver in October, 1883. There was, therefore, no change of possession, nor did those orders operate to transfer title from the petitioners to the receiver, or to the defendant railroad company, or to the mortgagee; those orders can not be

deemed as having the effect of transferring title prior to the payment of the purchase-money. There are two cases in the same volume following next after *Forgay* v. *Conrad*, wherein the decrees were held not to be final, namely, *Perkins* v. *Fourniquet* and *Pulliam* v. *Christian*. In the last case (6 How. 209) the decree had set aside a conveyance as being in fraud of the bankrupt law, and directed the trustee in insolvency to deliver over to the assignee in bankruptcy the property remaining undisposed of in his hands, but did not decide how far the trustee was liable for the proceeds of sales previously made and paid away to creditors, but directed an account to be taken of these last sums. The court held that such decree was not final. The language used in that connection is significant in the present instance. The court said:

"There is no sale or change of the property ordered which can operate injuriously to the parties. Under such circumstances, the decree not being final as to the whole matter in controversy, the appeal must be dismissed." (See p. 212.)

This case forcibly illustrates that where an order is made in a cause prior to the final decree disposing of the case, such order must operate as *an immediate transfer of title*, or *as an irreparable injury*, to warrant an appeal.

In *Craighead* v. *Wilson*, 18 How. 200, complainants had filed a bill to establish their title as heirs to certain property, and a decree had been obtained adjudging them to be heirs and entitled to the estate, and referring the matter to a special master to take an account as to the amount of the property. Such decree was held not to be a final decree. The court said:

"To authorize an appeal, *the decree must be final in all matters within the pleading, so that an affirmance of the decree will end the suit.*"

This case also holds (p. 202) that the decision in *Forgay* v. *Conrad* (*supra*) sustaining the appeal was made under the peculiar circumstances of that case. The peculiar circumstances have already been sufficiently adverted to, namely, that the execution of the decree would have operated as an irreparable injury to the defendant in the event of his success on the appeal.

In *Beebee* v. *Russell*, 19 How. 284, the court said:

"It has been the object of this court at all times, though an accidental deviation may be found, to restrict the cases which have been brought to this court, either by appeal or writ of error, to those in which the rights of the parties have been fully and finally determined by judgments or decrees in the court below, whether they were cases in admiralty, in equity, or common law. . . . This court also ruled in *Brown* v. *Swann* (9 Peters, 1), that a decree enjoining a judgment at law taxing a sum which remained to be ascertained with precision was not final, to permit an appeal from it. We might multiply citations from the reports of this court to show its caution upon this subject."

At page 286 the court further said:

"The object of the law, and the interpretation of it by this court, is to prevent a case from coming to it from the courts below in which the whole controversy has not been determined finally."

And at page 287 the court, in deciding what would constitute a final decree, said:

"So a decree upon the coming in of the master's report on a bill for specific performance, ascertaining the quantity of land to be conveyed, and the balance of money to be paid, and that the conveyance should be executed on such balance being tendered, is a final decree. (*Navis* v. *Waters*, 1 John. Ch. 85.) But in the last case cited it would not have been final if the decree *had not directed the*

conveyance of the land upon the sum found by the master being tendered."

In speaking of the Forgay case, and that the decree there was final, the court said (see p. 287):

"But it was so, upon the ground that the whole merits of the controversy between the parties had been determined, that the execution had been awarded, and that the case had been referred to the master merely for the purpose of adjusting the accounts. The fact is, the order of the court in that case for referring it to a master was peculiar, making it doubtful, if it could in any way control or qualify the antecedent decree of the court upon the whole merits of the controversy, or modify it in any way, except upon a petition for rehearing. We refer to the case, however, with confidence, to show that the reasoning of the opinion is cautionary upon the subject of bringing appeals, and confirmatory of what we have said in this case. We dismiss the case."

The court calls attention to the fact that it was the awarding of execution in the Forgay case which made the order therein entered appealable, and that there was nothing in the nature of the reference to the master's report that would likely modify in any way that order. This is very important in the present case, because the December, 1883, orders awarded no execution to the petitioners, and did not give them any method of collecting their money except as the receiver might choose to pay out of the earnings. The petitioners obtained by the decree (so called), *no right to sell* the corpus of the property to enforce their order, and the subsequent course of the case might have been such as not only to modify the December decrees, but to prevent the realization of any money whatever thereunder by petitioners.

The intervening petitions, filed in October, 1883, by R. S. Grant and The Grant Locomotive Works, were a

mere ingraft upon the bill of foreclosure. No subpena or other process against defendant had been issued on the petitions. Those petitions were to abide the result of the main cause. At the time the December orders were issued, there had been no order of sale entered in the foreclosure case; not even a decree *pro confesso* had been entered against the defendant. *Non constat* but that the defendant railroad company might have paid off the delinquent coupons upon which the right to foreclose was based, and have thus defeated any foreclosure or sale of the premises.

We think that the language of the court in *Beebe* v. *Russell*, just cited, is strongly applicable when we come to consider that the subsequent course of the foreclosure case might have been such as to render the December orders entirely valueless to the locomotive owners, and consequently entirely harmless to the defendant or the first mortgage bond holders.

In *Thompson* v. *Dean*, 7 Wall., the decree directed that the defendant below, appellant in the Supreme Court, transfer forthwith upon the books of the company 194 shares of stock, and directed further that an account be taken as to the amount paid and to be paid on dividends received on said stock. The question in the Supreme Court was whether this decree was final. It was held that it was final upon the ground stated by the court at page 345, namely:

"In this case the decree directs the performance of a specific act, and requires that it be done forthwith. The effect of the act when done is to invest the transferees with all the rights of ownership. It changes the property in the stock as absolutely and as completely as could be done by execution on a decree for sale. It looks to no future modification or change of the decree."

And the court restated the rule on the subject as laid down in *Forgay* v. *Conrad*, in the following language:

"When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such *decree carried immediately into execution*, the decree must be regarded as a final one to that extent."

It is to be observed that in our case there was no property in contest, because there was no contest involving title, and no property was directed to be delivered up in pursuance of an adjudication as to title, nor was any sum of money directed to be paid in pursuance thereof. The December orders amounted merely to a declaration that the court deemed it expedient for the receiver to buy these locomotives; and directed that he do so; and until money was applied to the purchase of such locomotives, to which either The Central Trust Company as mortgagee, or some other party in interest, should claim a better right or title than petitioners, there was no injury done and nothing about which to inaugurate a contest.

In *Railroad Company* v. *Swasey*, 23 Wall. 405, a bill had been filed to subject certain stock owned by the State of North Carolina in a railroad company to the payment of bonds issued by said state in payment of the state subscription to said stock, for payment of which bonds the state pledged as collateral the stock it owned in the railroad company. A decree was entered appointing a receiver to collect the dividends on the stock, finding that said dividends were insufficient to meet the interest in default upon the bonds; and further finding that the complainant had the right to have the necessary proportion of the stock sold to pay said interest; and ordered, adjudged,

and decreed that the commissioner theretofore appointed take an account of unpaid interest and of such other interest as would be due before the first day of April, 1875; and further directed that such proportion of the stock of the state in the railroad company as might be equitably applicable to the payment of said interest be sold unless the state within a time given levied a tax sufficient to pay said coupons. This was held not to be a final decree. The court said:

"An appeal may be taken from a decree of foreclosure and sale when the rights of the parties have all been settled, and nothing remains to be done by the court but to make the sale and pay out the proceeds. The sale in such case is the execution of the decree. But to justify such a sale the amount due upon the debt must be determined."

And in the case of *Crosby* v. *Buchanan*, *id.* 453, the court said:

"Cases can not be brought to this court upon appeal in parcels. We must have the whole of a cause or none. The court below must settle all the merits before we can accept jurisdiction. Appeals will lie, as has been frequently held, when nothing remains to be done except to enforce and give effect to what has been decreed, but until all the rights of the parties have been finally passed upon and settled, this can not be the condition of a cause. Nothing must be left below when an appeal is taken but to execute the decree."

We think it clear that this language means that the Supreme Court of the United States will not entertain appeals from decrees made incidentally in the course of a railroad foreclosure suit. If so, that court would be overwhelmed with separate appeals in cases where one appeal taken from the order of sale, or the order of distribution, would answer the same purpose. For example, in the

present case, if an appeal had been attempted to the Supreme Court from the December orders, we take it the Supreme Court on motion to dismiss would have held the appeal premature, because the orders provide that any balance of the amount of the purchase price of the locomotives not paid out of earnings should be paid out of proceeds of sale. It might well have been said there may never be a sale of the property.

A sale could be made only under the bill to foreclose, inasmuch as the December, 1883, orders, so far from awarding execution, did not even grant the *right to sell.* Therefore, every thing which constituted a defense to the foreclosure bill would defeat the execution of those orders. The railroad company might, at the date of those orders, have successfully defended against the bill; or, if an order had been entered directing the sale of the road on failure to pay, after the time fixed, the amount due on coupons, the company could have defeated foreclosure by paying that amount; or, if a sale had taken place, the property might have brought enough to pay all parties in interest in full. We think it perfectly clear that any of these grounds would have been sufficient to insure a dismissal of an appeal, by the Supreme Court, taken from the December orders.

In *Grant* v. *Phœnix Ins. Co.*, 106 U. S. 431, the court said:

"The present decree is not final according to this rule. *It does not order a sale of the property.* . . . It is true the court finds the amount due the appellee largely exceeds the value of the property, but this is only as a foundation for the order appointing the receiver. . . . The order for the delivery of the property is only in aid of the foreclosure proceedings, and to subject the income, pending the suit, to the payment of any sum that may in the end be found to be due. . . . There is no order, as in *For-*

gay v, *Conrad*, 6 How. 201; *Thomson* v. *Dean*, 7 Wall. 342, and other cases of like character, adjudging the property to belong absolutely to the appellee, and ordering *immediate delivery of possession*. In *Forgay* v. *Conrad*, *supra*, which is a leading case on this question, it is expressly said by Mr. Chief Justice Taney that the rule did not extend to cases where property was directed to be delivered to a receiver. The reason is that the possession of the receiver is that of the court, and he holds, pending the suit, for the benefit of whomsoever it shall in the end be found to concern. Neither the title nor the rights of the parties are changed by his possession. He acts as the representative of the court in keeping the property so that it may be subjected to any decree that shall finally be rendered against it."

The December orders did not direct any sale; and if the decree in *Grant* v. *Phœnix Ins. Co.* was not final, because it did not order a sale of the property, surely it is sufficient to establish the fact that the December orders are not final, for they do not direct a sale.

See also, *Burlington, etc., Ry. Co.* v. *Simmons*, 123 U. S. 52.

Suppose an appeal had been taken from the December orders to the Supreme Court, and that those orders had been affirmed, what would the result have been? The railroad would still have to be sold in order to realize or make good the lien, and there is no case where an appeal has been allowed from an order merely *establishing a lien* without giving *a right of sale*.

The orders merely provided that any balance remaining

" unpaid at the date of the foreclosure and sale of the said railroad or of the said division shall be a first lien thereon, and that said sale shall be made subject thereto."

It is to be observed that these orders do not even direct that

this undefined balance shall be paid out of the proceeds of sale, if such a sale ever should occur; but, on the contrary, they provide that such balance shall constitute a lien on the railroad in the hands of the purchaser; for the orders say, "Said sale shall be made subject thereto."

Under such an order as the above no right of appeal could possibly attach until there had been a foreclosure and sale, because until then it could not be determined that any party in interest would be injured by such orders. The only way in which such orders could operate to the prejudice of the trustees, or of the railroad company itself, would be by dimishing the price which the railroad would fetch at the foreclosure sale, if one should ever be decreed. The orders required that the purchaser should take the property subject thereto, and consequently he would bid that much less for the property.

Upon the foreclosure sale, the property might have brought enough to pay all the liens. In that event the complainant would have no right of appeal, because it would not have been injured, and the right of appeal would have devolved on the defendant, the railroad company. In the meantime it was impossible to determine whose rights were injured by the order, and consequently to whom the right of appeal accrued.

It thus appears that not only the amount of these liens at the date of sale, should one ever occur, was undefined, but also the party at whose expense the discharge thereof ultimately should be made, and therefore in whom the right of appeal vested, was likewise unascertained.

In *Porter* v. *Bessemer Steel Co.*, 120 U. S. 649, it was held that an appeal would not lie from an order declaring that all claims for labor, material, and supplies, were a lien upon the *corpus* of the property, prior to the first mortgage, for the reason that the names of the persons in

whose favor such liens existed were not specified in said decree, and that no party was named who could appeal from such order. (See p. 677.)

It is equally important that the amount of the claims should be ascertained as that the names of the owners thereof should be specified.

In the case of *Green* v. *Fisk*, 103 U. S. 518, the bill had been filed to obtain partition of real estate wherein the complainant claimed to be the owner of one-half of the property in question, and alleged that it was not susceptible of division, and prayed a sale thereof. Upon hearing, the complainant was decreed to be the owner of one-half of the property, and the case was referred to J. W. Gurley, master, to proceed to a partition according to law under the direction of the court. This decree was held not to be final. The court said, at page 520:

"In this case a partition by sale was asked for, because the property was not susceptible of division in kind. That the court has not ordered, and the reference to the master was undoubtedly to ascertain, among other things, whether such a proceeding was in fact necessary in order to divide the property. The master was in every thing to proceed under the direction of the court. He had no fixed duty to perform. He was the mere assistant of the court, not in executing its process, but in completing its adjudication of the partition which was asked. . . . In foreclosure suits, it has been held that a decree which settles all the rights of the parties and leaves nothing to be done but to make a sale and pay over the proceeds, is final for the purposes of an appeal. The reason is, that in such a case the sale is the execution of the decree of the court, and simply enforces the rights of the parties as finally adjudicated. Here, however, such is not the case, because still the court must act judicially in making the partition it has ordered. What remains to be done is not ministerial, but judicial. . . . The court is still to exercise its judicial discretion

in directing the movements and approving the acts of its assistants, until it has finally settled and determined on the details of the partition."

And so in the present case. This cause still remained before the court as a pending case, wherein it was intrusted with the duty of conducting this cause to a conclusion, and in the meantime to administer through its assistants the property which it had taken in its possession. That the court might review its own orders given to such receiver, and might review all acts of the receiver, controlling the same, as the exigencies of the case might require, until the case was ended, it seems to us can not be doubted.

The case of *The Union Trust Company* v. *The Illinois Midland Company*, 117 U. S. 434, is, in several respects, conclusive of the present controversy, in our judgment.

First. That case decides that where, in the administration of a railroad receivership, exigencies require that the court direct the receiver to make expenditures for the purpose of putting the road in repair, it may be done without notice to parties in interest, or even before a lien-holder be made a party to the case. But where such order is made, whether without notice to a lien-holder, or before such lien-holder is made a party to the case, the order is always open to subsequent inquiry by the court. And the party who buys certificates issued in pursuance of an order made under such circumstances takes them subject to the right of parties to inquire into the fairness and validity of such order, and to have the same set aside should it appear unjust or improper. This is clearly what is meant by the Supreme Court in the language used by it at page 456, wherein it says:

"Its power to do this does not depend on consent nor on prior notice. Consent is desirable, but seldom practi-

cable, where the debts exceed the value of the property. Though prior notice to persons interested, by notifying them as parties, first requiring them to be made parties if they are not, is generally the better way, yet many circumstances may be officially equivalent to prior notice. A full opportunity, as in this case, to be heard, *on evidence*, as to the propriety of the expenditures and of making them a first lien, is judicially equivalent. The receiver, and those lending money to him on certificates issued on orders made without prior notice to parties interested, take the risk of the final action of the court in regard to the loans. The court *always retains control of the matter*, its records are accessible to lenders and subsequent holders, and the certificates are not negotiable instruments."

It is to be observed that the court speaks of a "full opportunity" to be heard "on evidence" as to the propriety of the expenditures and of making them a first lien as the judicial equivalent to a prior notice; and it says the receiver and the money lender take the risk of the final action of the court in regard to loans of this character.

Neither the trustee in the mortgage, nor the defendant, the railroad company, had prior notice of the petitions in question, nor of the application for the orders of December 22, 1883; nor had they the judicial equivalent thereof, namely, full opportunity to be heard on evidence as to the propriety of the expenditures and of making them a first lien. Their right to this "judicial equivalent" continued to exist until such opportunity was afforded; and for the purpose of affording such opportunity the court "always retains control of the matter."

The present case is stronger than the ordinary case of a purchaser of receiver's certificates, because such purchaser has usually only constructive notice, while in the present case Grant and his solicitor had actual notice of the manner in which these orders were entered. The first

result of the decision in the Midland case (see p. 456), therefore, is that an order entered by a court directing a receiver to purchase supplies for a railroad is not conclusive or final, either as to the receiver or the purchaser of receiver's certificates, until the parties in interest have had full opportunity to test the question of the propriety of issuing such certificates and of making the same a first lien. According to this view, the orders in question here can not be regarded as final.

Second. The next conclusion to be drawn from the Midland case is that orders made in the administration of a receivership, prior to a final decree of foreclosure and sale, are merely interlocutory, and may be altered or varied in such final decree, though years may have intervened between the first and the final orders.

This is clearly shown by the action of the court in above case in reference to the appeal of Waring Brothers (see p. 475). On June 11, 1884, after the matter had been referred to a master and the master had reported in favor of the claim, the Circuit Court entered a decree as follows:

"And the court approves the findings and conclusions of the special commissioner under the head of the loan account in said report. . . . And that there was a balance of $54,900 and $32,000 respectively, due on account of such loan, and the court orders, adjudges, and decrees that the holders of such claim are entitled to *pro rata* payment out of the trust estate *before payment of bonds.*"

But by the final decree these two items were declared to be *subordinate* to the mortgage bonds, though allowed as an indebtedness contracted by the receivers. (See p. 477.)

This final decree was entered on June 1, 1885 (see p. 450 at the bottom), so that an entire year, lacking a few days, had elapsed between the making of a decree declar-

ing certain balances to be a lien *prior to all bonds*, and the final decree declaring the same balances to be *subordinate* to the mortgage bonds.

It never occurred to any one to claim that said final decree was a nullity.

The same point arises upon the appeal in the same case of S. A. Fletcher & Co. (See p. 480.) They were the holders of three certificates of the 17th series, and four certificates of the 18th series. By the orders of *June* 29, 1881, under which such certificates were issued, each certificate was declared to be a *special charge* and *lien* on the *line* and *property* in respect of which it should be issued, *superior in lien to all mortgage bonds* and debts of the company and receiver's debts, except such receiver's debts as had theretofore been declared by order of court to be special charges and liens on such line and property. (See p. 481.) In the final decree, which was entered *June* 3, 1885, the court reserved for future determination all questions of the relative priorities and equities among those holding receiver's certificates in case the respective property did not sell for enough to pay them all in full. From this modification, by the final order entered four years afterward, of the prior order of *June* 29, 1881, Fletcher took his appeal, and the Supreme Court held that the modification was proper, no one supposing or even suggesting that the order of the 29th of June, 1881, was final.

The decision holds (except as to taxes and receiver's certificates issued to pay taxes) that there can be no priority or preference among receiver's debts, "but that all should stand alike, *notwithstanding any orders heretofore made.*"

This opinion in itself is conclusive that orders, made in a case by the court in the course of administration of a

cause, whereby a receiver is directed to make repairs or purchase supplies, rolling stock, or other material, do not become final orders, as soon as the term at which they were made, has passed, taking rank as a lien on the property as of that date; so as to deprive the court of the right subsequently to issue any other certificates, in the course of the administration of the property, no matter what exigencies might arise, of equal dignity with those issued prior thereto. Such a doctrine is at war with every principle laid down by the Supreme Court in the case aforesaid. But it comes to that if courts are to have their hands tied by every order entered directing purchases by receivers, as soon as the term passes; and it comes to that if it be held in this case that Judge Baxter did not have the power, at a succeeding or subsequent term, to set aside orders made at a prior term authorizing the receiver to purchase property and making provision for the manner of paying therefor.

The intervenors claim that decrees of a like nature have been frequently held by the Supreme Court to be final decrees, and, as such, appealable. They cite decisions of this court in support of such claim. Examination of those cases shows that the decrees from which appeals were there allowed are unlike the decrees of December 22, 1883.

In *Fosdick* v. *Schall*, 99 U. S. 235, cited by appellees, the appeal was from a decree of distribution of the proceeds arising from the sale of the railroad in foreclosure proceedings, entered after confirmation of sale and deed to the purchasers had been made (p. 240). There could have been but little doubt such decree was appealable.

In *Fosdick* v. *Car Co.*, Id., also cited by appellees, the decree appealed from was made upon final distribution and after the sale and confirmation thereof (p. 257).

In *Trustees* v. *Greenough*, 105 U. S., cited by appellees, the decree appealed from was one directing the payment of a large sum of money out of a fund already in the hands of the receiver and ready for distribution. The decree was made upon issues joined between various lienholders interested in the fund and after a judicial hearing had been had (p. 531).

In *Savannah* v. *Jessup*, 106 U. S., cited by appellees, the appeal was from an order dismissing the intervening petition of the city of Savannah filed in foreclosure proceedings asserting a prior lien upon proceeds of sale to satisfy certain taxes that had accrued and had become a lien upon the corpus of the railroad. The order of dismissal was followed by a final decree made on the winding up of the case, adjudging that nothing but claims of laborers or mechanics should be a lien prior to the mortgage, or should be paid out of the funds in the hands of the receiver (p. 564). As to the effect of the final decree upon the right of Savannah to appeal from the earlier decree dismissing its petition, the court said (p. 565): "The order dismissing the city's petition was followed by a final decree, which, in terms, limited the distribution of the proceeds of sale to certain claims (the city not among the number), excluding all others. The orders in the court below therefore constitute, in every essential sense, a judicial determination adverse to the city's claims for taxes."

In *Miltenberger* v. *Logansport*, 106 U. S. 286, cited by appellees, the appeal was from a decree ordering the sale of the railroad, and directing certain claims to be paid out of

the proceeds. Such decree leaves nothing but ministerial duties to be performed, and would therefore be appealable.

In *Williams* v. *Morgan*, 111 U. S. 684, the appeal was from a decree fixing the amount to be paid the trustees on final distribution, as we understand the case.

None of these cases is authority for regarding the decrees of December 22, 1883, as final.

We ask that both the motions to dismiss and to affirm be denied.

Respectfully submitted,

EDWARD COLSTON,
GEORGE HOADLY, JR.,
Attorneys for Appellants.

CINCINNATI, *March*, 1890.

FILED.
MAR 22 1890

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

CENTRAL TRUST COMPANY *vs.* GRANT LOCOMOTIVE WORKS et al.	No. 1277.
DAYTON, FORT WAYNE & CHICAGO R. R. CO. *vs.* GRANT LOCOMOTIVE WORKS et al.	No. 1278.
CENTRAL TRUST COMPANY *vs.* R. S. GRANT.	No. 1279.
DAYTON, FORT WAYNE & CHICAGO R. R. CO. *vs.* R. S. GRANT.	No. 1280.

Brief for Appellees in support of Motions to Dismiss, united with Motions to affirm with Ten Per Cent. Damages, together with Form of Motions.

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Supreme Court of the United States.

OCTOBER TERM, 1889.

THE CENTRAL TRUST COMPANY OF NEW YORK, Appellant, vs. THE GRANT LOCOMOTIVE WORKS ET AL.	No. 1277.
THE DAYTON, FORT WAYNE AND CHICAGO RAILROAD COMPANY, Appellant, vs. THE GRANT LOCOMOTIVE WORKS ET AL.	No. 1278.
THE CENTRAL TRUST COMPANY OF NEW YORK, Appellant, vs. R. S. GRANT.	No. 1279.
THE DAYTON, FORT WAYNE AND CHICAGO RAILROAD COMPANY, Appellant, vs. R. S. GRANT.	No. 1280.

Motions to Dismiss and Affirm.

On this fifth Monday of March, 1890, being the 31st day of March, 1890, in the October Term of the year 1889, come the appel-

lees, the Grant Locomotive Works, the American Loan and Trust Company and R. S. Grant, and severally move this Court that the separate appeals of the Central Trust Company and of the Dayton, Fort Wayne and Chicago Railroad Company, appellants in the said causes respectively, be dismissed, for the reason that neither of the appellants has shown upon the records herein, or has, any right to appeal from the several decrees in the Circuit Court of the United States for the Southern District of Ohio, from which the said appeals purport to have been taken, and upon the ground that this Court has no jurisdiction to entertain either of said appeals.

The appellees, the Grant Locomotive Works, the American Loan and Trust Company and R. S. Grant, also at the same time move this Court to affirm the several decrees of the Circuit Court of the United States for the Southern District of Ohio appealed from by the appellants herein respectively, upon the ground that even if this Court has jurisdiction to entertain the said appeals, it is nevertheless manifest that each of the said appeals was taken for delay only, and that the questions upon which the jurisdiction of this Court depend are so frivolous as not to require further argument.

The said appellees also ask this Court in affirming the said decrees appealed from, to award to the appellees respectively damages at the rate of ten per centum upon the several amounts awarded by the said decrees, upon the ground that the said appeals were taken merely for delay.

The said appellees, pursuant to the provisions of said Rule 6, file herewith their printed brief in support of their said motions, and also an affidavit of the deposit in the mail at the post-office, in the City of New York, of notices of these motions and of the brief in support thereof addressed to Edward Colston, Esq., counsel for the appellants of record in this Court, at Cincinnati, Ohio, the proper address of the said counsel, at such a time as to reach him by due course of mail three weeks before the fifth Monday of March, 1890, the time fixed for submitting the said motions.

B. H. Bristow,
Wm. S. Opdyke,
Of Counsel for the Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

THE CENTRAL TRUST COMPANY OF NEW YORK, Appellant, vs. THE GRANT LOCOMOTIVE WORKS and THE AMERICAN LOAN AND TRUST COMPANY.	No. 1277.
THE DAYTON, FORT WAYNE AND CHICAGO RAILROAD COMPANY, Appellant, vs. THE GRANT LOCOMOTIVE WORKS and THE AMERICAN LOAN AND TRUST COMPANY.	No. 1278.
THE CENTRAL TRUST COMPANY OF NEW YORK, Appellant, vs. R. S. GRANT.	No. 1279.
THE DAYTON, FORT WAYNE AND CHICAGO RAILWAY COMPANY, Appellant, vs. R. S. GRANT.	No. 1280.

ON MOTIONS TO DISMISS APPEALS FROM THE CIRCUIT COURT OF THE

UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, UNITED WITH MOTIONS TO AFFIRM UNDER RULE 6, WITH TEN PER CENT. DAMAGES.

Brief on behalf of the appellees the Grant Locomotive Works, The American Loan and Trust Company and R. S. Grant.

STATEMENT.

These appeals are brought by the appellants severally from decrees entered in the Circuit Court of the United States for the Southern District of Ohio, on January 28, 1889, in favor of the appellees respectively. The decrees appealed from ordered that the purchasers of certain railways sold under foreclosure sales in 1884 and 1885, or their assignees (including the appellant The Dayton, Fort Wayne and Chicago Railroad Company), should pay to the appellees various amounts of money (all in excess of $5,000), or that the said railways should be resold to realize such claims. These foreclosure sales had been made in suits brought by the appellant, The Central Trust Company, as trustee for the bondholders, for the foreclosure of certain railway mortgages. The appellees were severally intervening petitioners in the said foreclosure suits, and their claims have been established by decrees of the said Circuit Court entered in such foreclosure suits in December, 1883. The appellants claimed that the said decrees of December, 1883, had subsequently been vacated. The said Circuit Court in June, 1887, adjudged that the said decrees of December, 1883, were in full force and effect. The decrees appealed from were decrees to enforce the decrees of December, 1883.

The motions to dismiss are made upon the ground that neither of the appellants has shown or has any right to appeal from the decrees of the Court below, and that this Court has no jurisdiction to entertain either of the appeals herein.

The motions to affirm are made upon the ground that even if this Court has jurisdiction to entertain the appeals, it is nevertheless manifest that the said appeals were taken for delay only and that the question upon which the jurisdiction of this Court depends is so frivolous as not to require further argument.

Printed transcripts of so much of the records in the causes as is considered material upon these motions [Watson vs. Nevin, 128 U. S., 578–579], have been served upon the appellants, together with this

brief, within the time required by Rule 6, and affidavits of such service duly filed with this motion. These printed extracts from the transcript of the records and will be referred to in this brief by pages.

FACTS.

In 1883, the Toledo, Cincinnati and St. Louis Railroad Company was a corporation of the States of Ohio, Indiana and Illinois, formed by successive consolidations, in 1881, 1882, and in May, 1883, of various corporations, including the Toledo, Delphos and Burlington Railroad Company, and the Cincinnati Northern Railroad Company (Rec. 1277–78, pp. 1, 6, 7 ; Rec. 1279, 1280, pp. 6, 7). Its railroads were narrow gauge railroads, and besides its main lines from Toledo via Delphos to East St. Louis and from Delphos to Dayton, Ohio, included a branch of 180 miles from Dayton, Ohio, via Welston, towards Ironton, Ohio, known as its Southeastern Division, being the railroad originally projected by the Dayton and Southeastern Railway Company, one of the constituent corporations consolidated into the said Toledo, Delphos and Burlington Railroad Company, (Rec. 1277–78, pp. 2, 4) ; and a branch of 42 miles, running from Cincinnati, Ohio, to Waynesville, Ohio (connecting with the Southeastern Division at Dodds, Ohio), known as the Cincinnati Northern Division (having been originally built by the said Cincinnati Northern Railway Company). (Rec. 1279–80, p. 2).

In 1880 the said Cincinnati Northern Railway Company mortgaged the said Cincinnati Northern Division to the appellant the Central Trust Company, as trustee, to secure an issue of $1,000,000 of its bonds, and it subsequentlymade other mortgages upon its property to the said Trust Company. These mortgages were assumed by the Toledo, Cincinnati and St. Louis Railroad Company upon the consolidation made in May, 1883 (Record, Nos. 1279–80, pp. 2, 7).

In 1881 the said Toledo, Delphos and Burlington Railroad Company, made two mortgages upon the said Southeastern Division, to the appellant, the Central Trust Company,to secure issues of $2,500,000 and $1,750,000 of its bonds respectively. These mortgages were assumed by the Toledo, Cincinnati and St. Louis Railroad Company upon its consolidation with the Toledo, Delphos and Burlington Railroad Company (Rec. Nos. 1277–78, pp. 2, 5, 7).

In the year 1883, the Toledo, Cincinnati and St. Louis Railroad

Company became insolvent and made default in the payment of interest upon the mortgages before mentioned, as well as upon other mortgages existing upon its other lines (Rec. Nos. 1277–78, pp. 4, 9; Nos. 1279–80, pp. 5, 7).

On August 1 and 2, 1883, in proceedings brought by one Braman, a judgment creditor of the Railway Company, Edwin D. Dwight was appointed Receiver of all the property of the company in Illinois, Indiana and Ohio, by orders made in the Circuit Courts of th United States, in various districts of the said States (Rec. Nos. 1277–78, p. 13, 49; 1278–80, pp. 12, 46).

On August 14, 1883, the appellant the Central Trust Company, filed its bill in the Circuit Court of the United States for the Southern District of Ohio, against the Toledo, Cincinnati and St. Louis Railroad Company, the Cincinnati Northern Railroad Company, the said Braman and another, asking a foreclosure of the said mortgages made by the Cincinnati Northern Railway Company and assumed by the Toledo, Cincinnati and St. Louis Railway Company (Rec-1279–80, p. 1). The cause thus instituted was cause No. 3,554, in Chancery, in said Circuit Court (Rec. 1279–80, p. 1).

In October, 1883, the said appellant The Central Trust Company filed its bill in the same Circuit Court against the Toledo, Cincinnati and St. Louis Railroad Company, the Toledo, Delphos and Burlington Railway Company and the said Braman for the foreclosure of the said mortgages made by the Toledo, Delphos and Burlington Railway Company. The cause thus instituted was Cause No. 3,578 in Chancery in said Circuit Court (Rec. 1277–78, pp. 1, 36).

On October 25, 1883, one William J. Craig was appointed Receiver of the mortgaged property in each of the said causes (Rec. 1277–78, p. 10; 1279–80, p. 9). The said Receiver Craig took possession of the said mortgaged property, superceding the possession of the former Receiver Dwight in Ohio (Rec. 1277–78, p. 13; 1279–80, p. 12).

The Toledo, Cincinnati and St. Louis Railroad Company had on August 1, 1882, entered into a contract with the appellee The Grant Locomotive Works for the conditional purchase by and sale to the Railroad Company of ten locomotives, Nos. 57 to 66, for the price of $105,000, payable in installments, the title to the locomotives remaining with the appellee until payment was fully made (Rec. 1277–78, pp. 12, 15). The whole purchase price was represented by bonds of the Railroad Company, made payable at the office of the American

Loan and Trust Company at Boston and certified by said Trust Company as Trustee.

The said Cincinnati Northern Railway Company had in March, 1883, prior to its consolidation with the Toledo, Cincinnati and St. Louis Railroad Company, entered into a contract with the appellee, R. S. Grant, for the conditional purchase by and sale to the said Railroad Company of ten locomotives, Nos. 67 to 76, for the price of $90,558.97, of which $18,558.97 were paid in cash, and the remaining $72,000 were made payable in monthly installments represented by bonds of the Cincinnati Northern Railway Company, the payment of which was assumed by the Toledo. Cincinnati and St. Louis Railroad Company upon the consolidation made in 1883, the title to the locomotives remaning in the said Grant until payment in full was completed (Rec. 1279-80, pp. 11, 14, 15).

In August, 1883, the Toledo, Cincinnati and St. Louis Railroad Company was in default in the payment of the bonds so given upon the purchase of the said locomotives, and under the provisions of the contracts between the parties the whole purchase price had become due by reason of such default, and the vendors was entitled to retake possession of their locomotives (Rec. 1277-78, pp. 13, 19, 20; 1279-80, pp. 12, 17, 18).

In and after August, 1883, the appellees demanded the surrender and return of their locomotives successively from Receivers Dwight and Craig; but the same was refused (Rec., 1277-78, p. 13, 1279-80, p. 12).

On October 27, 1883, the appellees, the Grant Locomotive Works and the American Loan and Trust Company, filed their petition in the said cause No. 3578, setting forth the said contract of conditional sale of August 1, 1882, the default of the Toledo, Cincinnati and St. Louis Railroad Company thereunder, and praying a surrender of the said ten locomotives sold thereunder, being locomotives Nos. 57 to 66, and the payment of all arrears due for rent, interest and repairs up to that time under said contract, and also any deficiency that might arise upon a resale by the appellee of the said ten locomotives and for other relief (Rec., 1277-78, pp. 12, 13, etc.).

Also on October 27th, 1883, the appellee, R. S. Grant, filed in said cause No. 3554, his petition with similar allegations as to the said contract of conditional sale made March 24, 1883, with the Cincinnati Northern Railway Company, and praying for the return of the ten locomotives Nos. 67 to 76, and the payment of the arrears due

for rent, interest and repairs up to that time, and also any deficiency that might arise upon a resale by the appellee of the said ten locomotives and for other relief (Rec., 1279–'80, pp. 11, 12, etc.).

On December 6, 1883, W. J. Craig, as Receiver, by J. B. Foraker, as his attorney, filed his answer to the intervening petitions of the appellees herein, admitting the agreements as alleged and the defaults of payment thereunder. The Receiver further answered that all the said locomotives were in his possession and were necessary to the operation of the railroads by him and prayed that the Court would make such order as would enable him to retain the possession and use of the said locomotives (Rec., 1277–'78, p. 22; 1279–'80, p. 21).

On December 22, 1883 (in the October Term of the Court), the said Circuit Court by the Hon. GEORGE R. SAGE, sitting as Circuit Judge, upon the said intervening petitions of the appellees and the answers of the said Receiver, made two orders in each of said causes Nos. 3554 and 3578, which orders are at the base of the contention herein (Rec., 1277–78; pp. 24, 26, 55, 57, 73, 74; 1279–80, pp., 23, 24, 55, 57, 67, 68).

Before the entry of the said orders the attorney for Receiver Craig had written to the presiding Judge a letter which was filed in the causes, and which is in the following terms:

Rec., 1277–78, p. 23; 1279–80, p. 22.

"CINCINNATI, Dec. 17, 1883.

"HON. GEO. R. SAGE,

"Columbus, O.:

"DEAR JUDGE: Mr. Wilson is anxious to get his judgment. I "don't know of any reason why he should not have it.

"He has prepared entries, to which I see no objection, in accord- "ance with the distribution of his property.

"I don't know of any good I could do by going with him to see "you. By my answers I have made no issues except as to damages, "and by his decrees he waives that claim.

"Very truly,

"J. B. FORAKER."

Each of the said four orders was in the following form:

"This said cause came on to be heard upon the petition and the answer of the Receiver thereto and upon the evidence submitted on behalf of said petitioners.

"And it appearing to the satisfaction of the Court that the Receiver has in his possession Grant Locomotive No. to , inclusive,
with tenders, and is using the same in the operation of the said Division of the defendant company's railroad between Ohio, and Ohio, and that the said locomotives are of the ten covered by the agreement of lease set out in said petition, and were acquired by the Toledo, Cincinnati and St. Louis Railroad Company under the terms of said agreement, and *was* so held at the date of the appointment of the Receiver herein;

"And it further appearing, that the present Receiver or his predecessor took the said locomotives with *its* tender, into his possession as such receiver on the first day of August last, and has had the same in continuous use and possession since that date without having made any payment on account of rental, as provided in said indenture of lease, or other compensation for the use thereof; and it further appearing that the said locomotives are, in the judgment of the receiver, necessary to the proper operation of said railway and should be acquired as part of its permanent equipment, and that the value of said locomotive and tender, as fixed in said agreement of lease is reasonable, and that the petitioners are willing upon the receipt of the contract price or upon being adequately secured therein to transfer the title of the same to the receiver;

"And the matter being fully heard by the Court, and upon due deliberation thereon, it is hereby ordered, adjudged and decreed that the Receiver pay to the petitioners as rental for said locomotive and tender, and in full for all claims for rental, interest and repairs down to the first day of December, 1883, the sum of $, the same being the amount due to said date under the terms of said lease.

"And the further sum of $, balance in full as purchase money for said locomotives and tenders.

"And it is further ordered that the Receiver pay said several amounts as part of the operating expenses of the said Division out of any money not appropriated for the payment of current labor, supplies and taxes.

"And it is further ordered and decreed that the said several amounts, with interest thereon at the sate of 6 per cent. from the first day of December, 1883, shall be a charge upon the earnings, income and all the property of the said Toledo, Cincinnati and St. L. R. R. Co., and especially of said Division, prior to the first mortgage or other bonded debt of said railroad and said division thereof, and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of the said railroad or said division shall be a first lien thereon, and the said sale shall be made subject thereto."

It may be remarked that these orders covered all the ten locomotives sold by R. S. Grant, but only four of the locomotives sold by the Grant Loco. Works, the other six being found to be in use in Indiana and Illinois and the appellees obtaining no relief as to them in respect to the property in Ohio.

Thereafter the October Term of the Court ended, and the February Term began (the first Tuesday of February, U. S. R. S., Sec. 658). During the February Term, to wit, on March 7, 1884, the Central Trust Company, alleging that it had not learned of the entries of the said decrees of December 22, 1883, until February 28, 1884, procured the entry of orders by direction of the Circuit Court (Judge Baxter), purporting to suspend the said decrees of December 22, 1883, until the further notice of the Court (Records 1277–78, pp. 27, 28; Records 1279–80, 25, 26. The orders were as follows:

> "Upon motion of The Central Trust Company complainant, and for good cause shown, it is ordered that the decree heretofore made in this cause on the 22d day of December, 1883, whereby it was ordered, adjudged and decreed that the receiver heretofore appointed in this cause pay to said out of any moneys in his hands not specifically appropriated, the sum of in full for the rent up to December 1st, 1883, of the Grant Locomotives Nos. and the further sum of as the balance of the purchase money due upon said locomotives, and that the same, with interest at the rate of six per cent. per annum, be a first and best lien upon the property of the said Toledo, Cincinnati and St. Louis R. R. Co., and especially upon the Division thereof, prior to the first mortgage thereon or to the bonded debt of said company, and that any sale thereof take place subject to the same, be, and the same hereby is, suspended until the further order of this Court; to all of which the petitioner aforesaid objects."

Before the termination of the February Term, to wit, March 15, 1884, the Central Trust Company filed so-called petitions "for rehearing" in respect to the said four decrees of December 22, 1883, alleging that the same were entered without notice to it and irregularly and inadvertently (but not alleging any discovery of new evidence), and praying that its said petitions might be taken as well for answers to the aforesaid intervening petitions, as for petitions for rehearing or review of the said intervening peti-

tions and orders (Records Nos. 1277-78, p. 36; Rec. 1279-80, p. 26). The said petitions for rehearing did not pray for the issue of any process, nor was any process issued thereon.

Thereafter, the February Term of the Court expired, and the April Term began on April 1, 1884, being the first Monday of April (U. S. R. S., 658).

During the April Term of the Court, to wit, on April 5, 1884 an order was made referring it to J. D. Cox to report as to the leased equipment in use upon the said railroads, its value, &c. (Rec. 1277-78, pp. 42, 53; 1279-80, pp. 41, 65). The appellees attended this reference under protest, claiming that as to them, the decrees of December, 1883, were final (Rec. 1277-78, pp. 53, 68; 1279-80, pp. 50, 51, 65).

Also during the April Term of the Court, to wit; on April 10, 1884, the Circuit Judge (Judge Baxter), made an order in each of the said causes purporting to annul the said decrees of December 22, 1883, which orders were in the following form (Rec. 1277-78, pp. 41, 59, 76; Rec. 1279-80, pp. 40, 58, 70).

> "This day this cause came on further to be heard upon the intervening petition of , filed in this cause October 27, 1883, and the Court being fully advised in the premises, does order, adjudge and decree as follows, to wit:
>
> This Court finds that the two decrees herein made and entered upon the said intervening petition on the 22d day of December, 1883, were entered without notice to the complainant herein and without proof; that the said decrees are erroneous and unjust to the bondholders for whom the plaintiff herein is trustee; that the said decrees are unauthorized by the pleadings and are based upon a misrecital of the facts as evidenced by the record in this case; the said decrees were authorized by the Court without examination, on the erroneous belief entertained at the time that all the parties in interest had assented to said decrees, and that the parties adversely interested acquired no knowledge of the allowance of said decrees until about February 24th, 1884, and after the adjournment of the Term of Court at which the same were entered.
>
> "And thereupon the Court, of its own motion, ordered, adjudged and decreed that the said decrees be and they are hereby annulled, set aside, and held for naught.
>
> "And the Court, coming now to determine the questions, arising upon the said intervening petitions of
> does order, adjudge and decree as follows, viz.:
>
> "That the relief prayed for in the said intervening petition be, and it is hereby, denied, except as hereinafter provided.

* * * * * * * * *

"And the Court doth further ffnd that the said petitioners are entitled to take and possess themselves of his said rolling stock wherever the same may be found in the possession of the Receiver appointed in this cause or of the Receiver appointed in causes numbered 3576, 3577 and 3579 in this Court.

* * * * * * * * *

"And the said applied for leave to answer the petition of the complainant the Central Trust Co., filed March 15, 1884, and to support their answer by affidavits or other proof, and the Court, entertaining the opinion that the answer or affidavits proposed are by force of the foregoing decree rendered unnecessary, declined to grant the leave asked, and refused to permit an answer to said petition for rehearing on affidavit or other proof in support thereof to be filed.

"And thereupon the intervening petitioners in open Court prayed an appeal from the foregoing decree, which is thereupon disallowed by the Court."

By these orders of April 10, 1884, it appears that they were made by the Court of its own motion, and not upon the aforesaid petitions for rehearing. It also appears that the Court refused the intervening petitioners leave to answer the petitions for rehearing, or to offer proof and also refused to permit any appeal.

In June, 1884, the Southeastern Division of the Toledo, Cincinnati and St. Louis Railroad Company was sold under decree of foreclosure made in the foreclosure suit aforesaid (Decree, March 31, 1884, Rec. 1277–78, p. 28). Such sale was duly reported and confirmed July 18, 1884 (Rec., pp. 44 and 46). The Cincinnati Northern Division of the said railway was sold under foreclosure decree in the said foreclosure suit on June 27, 1885 (pursuant to decretal orders of March 29, 1884, and April 17, 1885), and the said sale was confirmed by an order made July 9, 1885 (Rec., 1279–80, pp. 32, 42, 43).

The decree for the sale of the Southeastern Division provided that unless the railroad company defendant should within ten days pay into Court the amount of interest in arrears and the sum of $20,000, to be applied to the payment of costs and expenses, including the Receiver's indebtedness, then the property should be sold and; that upon the sale not less that $20,000 of the bid should be paid in cash, and such further portions of the bid should be paid in cash as the Court should from time to time direct to meet other claims, which the Court should adjudge to be prior to the first mortgage—the Court reserving the right to resell on failure to comply with any

order in that regard; and that the balance of the purchase money should be paid either in cash or in bonds taken at their net value under the decree (Rec. 1277–78, pp. 33, 35).

The decree for the sale of the Cincinnati Northern Division made provisions similar in all respects except that the amount to be paid *nisi* for costs and expenses was $50,000, and the amount of the bid to be paid in cash was $50,000 and such further amount as should be adjudged for prior claims, etc. (Rec. 1279–80, pp. 37, 39).

The Southeastern Division was sold to N. H. Mansfield and others of Boston, Lowell and New York, as trustees, for $500,000 (Rec. 1277–78, p. 46). The Cincinnati Northern Division was sold to J. N. Kinney, A. S. Winslow and others for $200,000 (Rec. 1279–80, p. 42).

On the confirmation of each of the said sales it was ordered that the purchasers, upon paying in cash the $20,000 or the $50,000, respectively before specified, should receive a conveyance, in fee simple, of all the mortgaged property and of all the right, title and interest therein of all the parties to the cause, and should become subrogated to all the rights therein of all the lienholders, parties to the suit, and that the Receiver should thereupon surrender possession of the mortgaged property to such purchasers (Rec. 1277–78, p. 47; Rec. 1278–80, p. 44.

Each of the said orders of confirmation contained further the following clause (Rec. 1279–78, p. 47; Rec. 1278–80, p. 44):

> " It is further hereby ordered, adjudged and decreed that " this decree of confirmation of the sale of the premises and " property, rights and franchises aforesaid, be subject to the " terms and provisions of the decree of sale heretofore entered " in this case, whereby it is provided that of the purchase price " so bid at the said sale such further portions thereof in addi- " tion to the said sum of dollars heretofore men- " tioned, shall be paid in cash, as this Court might from time to " time in this case direct, in order to meet other claims which " this Court has or hereafter may adjudge in this case to be " prior in equity to said first mortgage, and whereby this Court " did reserve the right to resell in this case said premises " and property, rights and franchises upon the failure to comply " within twenty days with any order of this Court in that re- " gard; and the right, title and interest of the said purchasers " in and to the premises and property, rights and franchises " aforesaid by virtue of the said sale, and this confirmation " thereof and of the deed to be made in pursuance hereof, shall " be deemed to be acquired subject to said provisions."

No other or further provision was made in the said orders of confirmation for the payment by the purchasers into Court of any other sum in cash or any of the bonds, or for the presentation of any of the bonds secured by the mortgage foreclosed.

The purchasers of the said Southeastern Division subsequently assigned the property so bought by them to the appellant, The Dayton, Fort Wayne and Chicago Railroad Company (Rec. 1279-80, p. 85).

The purchasers of the said Cincinnati Northern Division subsequently assigned the mortgaged property bought by them to the Cincinnati and Lebanon and Northern Railway Company (Rec. 1277-78, p. 85). Neither the purchasers of the Cincinnati Northern Railway nor the said railway company, their assignee, have taken any appeal in these causes.

On February 8, 1887, with leave of Court, the appellees, the Grant Locomotive Works and R. S. Grant each filed petitions in each of the said causes, Nos. 3554 and 3578, reciting the facts as aforesaid, and alleging that the orders of April 10, 1884, purporting to annul the decrees of December 22d, 1883, were void and that the decrees of December 22, 1883, were still in full force, and further alleging that they had never received any payment for their locomotives and praying that the said decrees of December 22, 1883, be adjudged to be in full force and effect, and that the same should be carried into execution (Rec., 1277-78, pp. 49, 63; Rec., 1279-80, p. 46, 60). The purchasers of the Southeastern and of the Cincinnati Northern Divisions demurred to such petition, and the Central Trust Company made answer to the same (Rec., 1277-78, pp. 78, 79, 81; Rec., 1279-80, pp. 75, 76, 78).

The said petitions were heard upon orders to show cause before Hon. STANLEY MATTHEWS, the Justice of this court, sitting in the said Circuit, and Hon. HOWELL E. JACKSON, the Circuit Judge; and on June 11, 1887, orders were made decreeing that the said orders of April 10, 1884, should be set aside and held for naught, and that the said decrees of December 22, 1883, should be restored (Rec. 1277-78, p. 83; Rec. 1279-80, p. 80.)

The said orders were as follows:

> "This cause this day was heard upon the petition of R. S. Grant and of the Grant Locomotive Works, respectively, herein filed February 8th, A. D. 1887, asking that certain orders hereinbefore made, to wit, on the 10th day of April, A. D. 1884,

asking the Court to set aside and hold for naught certain other orders heretofore made herein on December 22, 1883, directing that the Receiver pay said petitioners, as rental for certain locomotives and as balance of purchase money therefor, certain sums specified in said orders, and making the same a lien upon certain property described in said orders made upon the joint intervening petition of filed in this cause October 27, 1883, and was argued by counsel, and the Court being fully advised in the premises, it is ordered, adjudged and decreed, that said orders of April 10, 1884, setting aside said order of December 22, 1883, be and the same hereby are set aside and held for naught, and that said order of Dec. 22, 1883, be and the same hereby is restored.

And thereupon came the complainant, The Central Trust Company, and prayed an appeal to the Supreme Court of the United States from this decree setting aside said order made April, 1884, and restoring said orders of Dec. 22, 1883, which appeal is allowed upon complainant giving bond for costs in the sum of $500, to be approved by the Clerk of this Court."

The Central Trust Company never perfected the appeals so allowed.

On January 28, 1889, upon motions of each of the said intervening petitioners being made in both the said causes, and argued before Judge JACKSON, the Circuit Judge, decrees were entered in said causes requiring the respective purchasers to make payments into Court, within sixty days, of the amounts still due to the intervening petitioners, and that in default of such payment the mortgaged properties should be resold. (Rec. 1277–78, pp. 84, 88; Rec. 1279–80, pp. 81, 85.) *These are the decrees now appealed from.*

Pending the hearing of the said motion, the Central Trust Company prayed that its said petition for rehearing, filed March 15, 1884, be then heard as a petition for a rehearing, or that the same be taken or held to be a bill of review, or that the said petition be amended and supplemented in certain respects, and docketed as an original bill of review as of March 15, 1884; all of which was denied, the Trust Co. excepting (Rec. 1277–78, pp. 84, 88; Rec. 1279–80, pp. 81, 85).

Also pending the said hearing the appellant, the Dayton, Fort Wayne and Chicago Railroad Company as assignee of the purchasers of the Southeastern Division, prayed leave to intervene and be heard in review of *three* of the orders of December 22, 1883, which

application was denied, the Railroad Co. excepting (Rec. 1277–78, pp. 85, 89 ; Rec. 1279–80, p. 82).

These decrees of January, 1889, ascertained that there was due to the appellees, the Grant Locomotive Works, for locomotives Nos. 57–62, and Nos. 64–66, which had been used upon the Southeastern Division, the amount of $94,026.28, with interest from November 12, 1888 (Rec. 1277–78, p. 86), and for locomotive No. 63, which had been used on the Cincinnati Northern Division, the amount of $8,418.67, with interest from November 12, 1888 (Rec. 1277–78, p. 90).

The said orders also ascertained that there was due to the appellee, R. S. Grant, for locomotives Nos. 67, 68, 72, which had been used upon the Southeastern Division, the amount of $29,083.96, with interest from November 12, 1888, and for locomotive No. 73, which had been used upon the Cincinnati Northern Division, the amount of $6,995.75, with interest from November 12, 1888 (Rec. 1279–80, pp. 83, 87).

The said orders further decreed that the purchasers of the Southeastern and the Cincinnati Northern Divisions should pay the appellees the said amounts respectively, and that on default thereof the said Divisions should be resold to realize the said amounts respectively; but provided that such orders should be without prejudice to any right of contribution as between the said purchasers and the purchasers of other divisions of the Toledo, Cincinnati and St. Louis Railroad under foreclosure proceedings.

From all said orders of January 28, 1889, the Central Trust Company was allowed and it perfected appeals to this Court. It also procured the allowance of a bill of exceptions from the ruling of the Court, denying its motion that its so-called petitions for rehearing filed March 15, 1884, be amended and supplemented and docketed as original bills of review as of March 15, 1884 (Rec., 1277–78, p. 92 ; Rec., 1279–80, p. 88.)

The appellant, the Dayton, Fort Wayne and Chicago Railroad Company, was allowed, and perfected, appeals to this Court from parts of three of the said orders of January 28, 1889; but did not ask for any appeal from the order in respect to the claim of R. S. Grant for $6,995.75 with interest from November 12, 1888, in respect to the Cincinnati Northern Division ; nor has any appeal been taken from that order on behalf of the purchasers of the Cincinnati Northern Division (Rec. 1279-78, pp. 85–88).

ARGUMENT.

The appeals of the Central Trust Company and of the Dayton, Fort Wayne and Chicago Railroad Company herein, should each be dismissed.

As to the Central Trust Company, Appellant.

Neither the Trust Company as trustee nor the bondholders as such, can be affected by the decrees of January 28, 1889, from which these appeals are taken, because those decrees order merely that the purchasers of the Cincinnati Northern Division (or their assignee the Cincinnati, Lebanon and Northern Railway Company), and the purchasers of the Southeastern Division (or the Dayton, Fort Wayne and Chicago Railroad Company, their assignee), shall pay to the appellees the sums of money mentioned in the decrees, and that in default thereof there shall be a resale of the said divisions respectively to realize the said sums of money. These orders in no wise affect the Central Trust Company, nor the bondholders who were represented by the Trust Company pending the foreclosure. The bondholders, as such merely, have no further interest in the litigation. If the bondholders, as purchasers, have any interest in the questions, they are not, as such purchasers, represented by the Trust Company.

This question was plainly decided in Farmers' Loan and Trust Co. vs. Waterman, 106 U. S., 265. There, as here, the trustee in the mortgage foreclosed appealed from decrees of the Court adjudging certain claims liens upon the mortgaged property, after a sale made under a decree which charged the purchasers with the payment of any lien so adjudicated. This Court held that the mortgage trustee had no interest in such appeal, although the foreclosure decree below had expressly reserved a right of appeal to such trustee. The The Court, *per* Chief-Justice WAITE, said (p. 269): "Only parties "to a decree can appeal. If a party to the suit is in no way affected "by what is decreed, he cannot be said to be a party to the decree. "A reservation of the right to appeal has no effect if there is no de- "cree from which an appeal, such as has been reserved, will lie. In "the present case, as has already been seen, the several claimants or "intervenors and the purchasing committee were the only parties to "the suit affected by the decree. * * * Neither the trust com-

" pany nor those it in equity represents can gain or lose by either " a reversal or affirmance of the decree appealed from."

As to the Dayton, Fort Wayne and Chicago Railroad Company, appellant.

I. This appellant is the assignee of Mansfield, Pendergrast, Maury, Haskell, Kimball and Corbin, who as trustees bought the Southeastern Division for the price of $500,000, and paid $20,000 of such bid in cash upon receiving their deed and possession thereunder; the decree confirming such sale ordering that such further portions of the bid should be paid in cash as the Court might from time to time direct in order to meet other claims which the Court had or thereafter should adjudge to be prior in equity to the said first mortgage, with a reservation of a right of resale on default of such payment, etc. Nothing, therefore, in the said decrees of January 28, 1889, here appealed from, required the said purchasers or the appellant The Dayton, Fort Wayne and Chicago Railroad Company as their assigns, to pay any amount in excess of the $500,000 which the purchasers bid for the property purchased by them. The said appellant, therefore, has no right of appeal from the said decrees.

This question has also been substantially decided by this Court in the case of Swann vs. Wright's Executor, 110 U. S., 590. In that case, as in these, the assignee of the purchaser at foreclosure sale sought to review certain intervening claims adjudicated in the foreclosure suit to be liens upon the property sold at the foreclosure sale. The purchaser had bought the property subject to liens established at or before the decree of sale, or which might thereafter be established upon references then pending as prior to the lien of the mortgage. The purchaser claimed that a certain lien adjudicated after the sale had been established fraudulently, and sought to reduce the amount thereof.

This Court held that the purchaser having taken the property expressly subject to the lien established was in no position to object to or review the same. It was said, per Mr. Justice HARLAN: " Such " purchaser has no standing in Court for the purpose of relitigating " the liens expressly subject to which he bought and took title. The " allegations of fraud and imposition alleged to have been practiced " by Wright and others by means whereof it is contended the claims " in question where proved and established, whatever consideration " they would have been entitled to in a suit brought by the bond-

" holders, do not present matters which under the circumstances " concern the appellant as purchaser of the property."

It may be remarked that this decision has been followed in the Second Circuit in the case of the Central National Bank vs. Hazard; 30 Fed. Rep., 484, and in other cases.

II. The railroad company appellant has not appealed from the whole of the decrees entered January 23, 1889, but excepts from its appeal from each decree so much thereof " as provides that the " same is without prejudice to any contribution which may be found " to be just and proper as to any payment made by any of the pur- " chasers under the provisions of the said orders or realized under " any re-sale made under this order." And the Court below allowed the appeals, " while expressing a doubt whether any such appeal will " lie." (Rec. 1277-78, pp. 87, 88, 91 ; Rec. 1279-80, pp. 84, 85).

It is submitted that an appeal thus attempted from a portion only of a decree, is unknown to the practice of this Court, and should be dismissed as ineffectual. Especially is this so where, as in this case, the appellant is endeavoring to save by its appeal a provision of the decrees appealed from which is in its favor, and the appellant is thus attempting to take advantage in its own behalf of a portion of the decrees from which it appeals.

As to both Appellants.

Neither appellant can maintain its appeal unless the record clearly shows an interest of such appellant alone under the decress appealed from. In these cases the record shows neither that the Central Trust Company has any interest in the decrees appealed from, nor that the Railroad Company, appellant, has any such interest.

In the case of the Southeastern Division, more than four years, and in the case of the Cincinnati Northern Division, more than three years, after the confirmation of the sales of the said divisions respectively, had elapsed before the making of the decrees appealed from. It is to be presumed that the proceeds of such sale had been distributed long previously to the entry of the decrees appealed from requiring the purchasers to make additional cash payments on account of their bids. Presumptively, therefore, the bondholders had received the shares of the purchase money to which they were entitled, and they will neither be benefited nor injured by anything which is effected by the decrees appealed from. If this is the case, the Cen-

tral Trust Company, as trustee for the bondholders, has no interest in the matters affected by the decrees appealed from.

If, on the other hand, it could possibly be the case that the purchasers have not finally completed the payments of their respective bids of $200,000 and $500,000 for the said divisions, and it still remains an open question whether the balances of the payments of their bids are to be made wholly for the benefit of the bondholders, or partly only for the benefit of the bondholders and partly for the benefit of the appellees under the orders appealed from ; then it is equally plain that the Railroad Company appellant, as one of the purchasers, has no interest in the matters affected by the decree appealed from. In that case it must be a matter of indifference to the Railroad Company appellant whether it is to pay the balance of its bid wholly for the benefit of the bondholders or partly for the benefit of the appellees.

The record, therefore, fails in any event to show either that the Trust Company appellant is interested in the decrees appealed from, or that the Railroad Company appellant is so interested. It would not be sufficient to support the jurisdiction of this Court that it should appear probable that one or the other of the appellants has an interest in the litigation. If the appeal of either appellant is sustained it must be upon something contained in the record which shows that particular appellant to have an interest in the litigation.

It is clear that both appellants cannot have an interest in the matters affected by the orders appealed from. If the Court thinks that upon the facts appearing upon the record one or the other appellant may have such interest, that would not be sufficient to sustain either appeal. Is must appear that the particular party has such an interest in the matter as to be entitled to protect it.

If the motions to dismiss are not granted as to both the appellants, nevertheless the motion to affirm the decree below with ten per cent. damages should be granted.

I . Rule 6, as amended, allows a motion to affirm to be united with a motion to dismiss.

There has been in these cases sufficient color of right to a dismissal to justify the Court in considering the motion to affirm within the rulings of this Court.

Whitney vs. Cook, 99 U. S., 607.

Hinckley vs. Morton, 103 U. S., 764.
Micas vs. Williams, 104 U. S., 556.
The "S. C. Tryon," 105 U. S., 267.
Swope vs. Leffingwell, 105 U. S., 3.
School District of Ackley vs. Hall, 106 U. S., 428.
Evans vs. Brown, 109 U. S., 180.
Davies vs. Corbin, 113 U. S., 687.
Eureka Lake Co. vs. Yuba County, 116 U. S., 410.
Walston vs. Nevin, 128 U. S., 578.
The Alaska, 130 U. S., 201.

Moreover it has been said by this Court, in Chanute City vs. Trader, 132 U. S., 210: "If the prosecution of writs of error to the "execution of process to enforce judgments is permitted when no "real ground exists therefor, such interference might become intol- "erable. This Court, in the exercise of its inherent power and "duty to administer justice, ought independently of subdivision 5, "of Rule 6, to reach the mischief by affirming the action below. "This is a proper case for doing so." Here as there, the appellants are seeking to stay the execution of an order to carry into effect a decree of the Court below, which has not itself been appealed from. The delay thus sought to be attained by an appeal without support should be overcome by a prompt affirmance of the decrees below.

II. The decrees of January 28, 1889, appealed from, were correct and should be affirmed.

These decrees were merely decrees to carry into effect the former action of the Court, which decrees, it will appear, are now incontestable by anyone, in any forum, and are in absolute force and effect.

As to the decrees of December 22, 1883, it is plain that they were final decrees and as such appealable to this Court. These decrees were each for amounts in excess of $5,000. They were made upon the intervening petitions of the appellees claiming to be the owners of certain locomotives then in the possession of a Receiver appointed by the Court. The decrees virtually adjudicated (1), that the appellees owned and had a right to the possession of the fourteen locomotives; (2), that these locomotives were essential to the use of the railroads by the Receiver and should be purchased by him; (3), that the prices to be paid for the locomotives, by the Receiver, should be the amounts fixed by the said

decrees. Decrees of this nature have frequently been held by this Court to be final decrees; and, as such, appealable to this Court.

Fosdick vs. Schall, 99 U. S., 235.
Fosdick vs. Car Co., 99 U. S., 256.
Trustees vs. Greenough, 105 U. S., 527.
Savannah vs. Jessup, 106 U. S., 563.
Miltenberger vs. Logansport R. R. Co., 106 U. S., 286.
Williams vs. Morgan, 111 U. S., 684.

These decrees being *final* decrees, the Circuit Court had no power to vacate or modify the same, either upon its own motion or upon a petition for a re-hearing after the close of the October term.

Barrell vs. Tilton, 119 U. S., 637.
Bronson vs. Schulten, 104 U. S., 410.
McMicken vs. Perin, 18 How., 507.
Cameron vs. M'Roberts, 3 Wheat., 591.

It is only in cases of decrees from which no appeal will lie, that a re-hearing may be had at the term next succeeding the term at which they are entered. (Equity Rule No. 88).

There was no way, therefore, in which these decrees could be modified, except by an appeal therefrom taken within two years, or by the filing, within two years, of a bill of review for error upon the face of the record, or by the filing of a bill of review, while the cause remained in the Circuit Court, and by leave of Court first obtained, upon the ground of new matter or newly discovered evidence.

Mueller vs. Ehlers, 91 U. S., 249.
Buffington vs. Harvey, 95 U. S., 99.
Ensminger vs. Powers, 108 U. S., 292, 302, and cases there cited.
Mitford & Tyler's Equity Practice, 487.

Neither of these courses was pursued. It is true that on March 7, 1884, during the February Term of the Court (the Term next succeeding the October Term), the Court, upon motion of the Central Trust Company, made an order purporting to suspend the decrees of December 22, 1883. This order was made without the filing of any petition for rehearing; but, if it were otherwise, a petition for rehearing, as has been seen, cannot be filed in the Circuit Court, even at the next succeeding Term, as to a decree appealable to this Court. It is also true that on March 15, still during the February Term, the Central Trust Company filed so-called "petitions for rehearing," which it asked might be taken as well for answers to the intervening petitions filed by

the appellees in October, 1883, as for petitions for rehearing or review of the said intervening petitions and of the decrees of December 22, 1883. As has been seen, these were unavailing as petitions for rehearing, the October Term having expired and the decrees of December 22, 1883, being appealable decrees. Neither were these petitions available as bills of review or petitions in the nature of bills of review. This plainly was not the then intention of the Central Trust Company. No process was prayed for upon the said so-called petitions and none was ever issued thereon. Moreover, no decree, or other action of the Court, was ever made thereon. It was not until the hearing of the motion upon which the decrees of January 28, 1889 now appealed from were made, that the Trust Company asked that its petitions filed March, 1884, be heard as petitions for rehearing, or, if that were denied, that the same should be taken and held to be bills of review, or bills in the nature of bills of review, or, if that were denied, that the petitions be amended and supplemented in certain respects and then docketed as original bills of review as of March 15, 1884. This motion being addressed to the discretion of the Court, and being made more than four years after the filing of the petitions, was properly denied, and such denial cannot be the ground of appeal.

On April 10, 1884 (at the second Term after the expiration of the October Term, 1883), the Circuit Judge, Hon. JOHN BAXTER, caused to be entered in the causes below, the orders which have been fully set forth in the foregoing statement of facts. In these orders the Court, *of its own motion*, attempted to annul, set aside and hold for nought, the decrees of December 22, 1883, on the ground that the same were erroneously entered and were unjust.

Nothing can be plainer than that these alleged orders of April 10, 1884, were absolutely null and void, and of no effect. They were not even made upon any alleged petitions for rehearing, and, as has been seen, no petition for rehearing could have been filed after the commencement of the February Term. They were not made upon any bill of review, either for error upon the face of the record or for new matter or newly discovered evidence. They were made upon the motion of the Court itself, at a time when the Court, within the cases above cited, had absolutely lost all power or jurisdiction over decrees made at the October Term. Not only was all this so, but the Court refused to allow an issue to be made as to the facts alleged as the foundation of the orders, or to hear evidence or

allow an appeal from the orders so made. Under whatever misapprehension the Judge making these orders may have labored at the time, or whatever criticism might be made of the action so taken, nothing more need be said now than that the orders were beyond the power and jurisdiction of the Court. The whole matter was *coram non judicie.*

These so-called orders of April 10, 1884, being beyond the power and jurisdiction of the Court were absolutely void, and could at no time have had any effect whatever. They were absolute nullities and were not decrees of the Court. It was not necessary to attack or impeach the so-called orders by bills of review, for no lapse of time could add force or efficacy to the entries thus made. "A void judg-" ment is in legal effect no judgment. By it no rights are divested. " From it no rights can be obtained. Being worthless in itself all " proceedings founded upon it are equally worthless. It neither binds " nor bars any one. All acts performed under it and all claims " flowing out of it are void. The parties attempting to enforce it " may be responsible as trespassers" (Freeman on Judgments, Sec. 117).

" Hence a sale based upon a void judgment has no foundation in " law. It must certainly fail" (Freeman on Void Judicial Sales, Sec. 2; Jenkins vs. Hanon, 26 Fed. Rep., 657, 660).

" To hold a judgment binding when the record disclosed a want " of authority over the defendant, would be to impeach rather than " to sustain the absolute verity of the record" (Freeman on Judgments, Sec. 116).

" A Court or Judge having anthority to proceed at one time, may " be divested of its jurisdiction either temporarily or permanently. " The Court may be abolished or its jurisdiction may be divested " by statute. The proceedings may be removed into some appel-" late tribunal. The term of Court may be adjourned *sine die,* in " which case no judgment can be entered before there opening of the " Court at its next Term, unless expressly authorized by statute. In " all cases where a Court is rendered incompetent to proceed, its " proceedings during such incompetency are as invalid as though it " had never possessed jurisdiction" (Freeman on Void Judicial Sales, Sec. 7).

In Griffith vs. Frazier, 8 Cranch, 9, Chief-Justice MARSHALL held, that the appointment by a Probate Court of an administrator of an estate, an executor having been previously appointed thereof, was

absolutely void *ab initio*. See also Wales vs. Williard, 2 Mass., 120.

In another aspect it is equally clear that the decrees or orders of December 22, 1883, were made in the orderly administration by the Court of the property in the hand of its Receiver.

The petitions of the appellees filed in October, 1883, were in the nature of proceedings pending sequestration where third persons claim some of the property sequestrated, an examination *pro interesse suo* is ordered. In cases of this character where the Court finds the claimant's interest clear and undisputed, it may make an order in his favor without inquiry (II. Daniel's Chan. Prac., 1058, 1059; Dixon vs. Smith, 1 Swanst., 457; Empringham vs. Short, 3 Hare, 461). In this case there was no dispute, and there is none now, as to the title of the petitioners to the locomotives in question. There was no doubt, therefore, of the right of the petitioners to an order that the Receiver should surrender the locomotives to the petitioners.

But further a question was before the Court upon the showing by the Receiver that the possession of the locomotives by him was absolutely necessary to the operation of the mortgaged property, then in the possession of the Court through the Receiver. The question, therefore, for the Court to decide was whether a purchase should be made of the locomotives, and if so what the amount of the purchase price should be and how it should be paid. In deciding this question there was no necessity that the Court should consult the bondholders or their trustee, or any other party to the litigation. The Court deemed itself sufficiently informed by its officer, the Receiver. When the Court, therefore, decided upon the purchase of the locomotives and found that the purchase price made in the original contracts, was the proper price, there remained nothing to be decided other than the question of the mode in which the purchase money should be paid. Under well established rules, the amount of such purchase price would become a lien upon the earnings of the railroad in the hands of the Receiver, and in case the amount was not so discharged then a lien upon the corpus of the property prior to the lien of the mortgages thereon.

In one sense, therefore, the orders or decrees of December 22, 1883, merely evidence contracts made by the Receiver under the authority of the Court while in possession of the mortgaged property, and for the benefit of such property. As contracts so made within the power and jurisdiction of the Court, and with the assent

of the owners of the locomotives, these orders must stand as contracts, which have always been beyond the power of any one to impair. The lien specified in the decrees, would have arisen and existed by virtue of the making of the purchase by the Receiver under authority of the Court, even if the decrees had been silent as to such lien. The debts so incurred by the Receiver, were charges on the property.

It must, of course, be presumed that the action of the Court in fixing the amount of the purchase price, was taken advisedly. But, it may be remarked that the purchase so made of the said locomotives, not only acquired locomotives of a peculiar class for the operation of of a narrow gauge railroad, at a time when it might have been impossible to procure such locomotives elsewhere ; but, also, that such purchase extinguished the claims of the petitioners for prior rentals, repairs and depreciation of the locomotives, which under well settled rules, might have become liens upon the mortgaged property, even if the locomotives themselves were surrendered to the petitioners.

Accordingly when the appellees moved the Circuit Court, in 1887, to declare that the so-called orders entered on April 10, 1884, to be without effect, and to adjudge that the decrees of December 22, 1883, were still valid, effectual and final, the Court, after a full argument, and upon deliberation had by Mr. Justice MATTHEWS and Circuit Judge JACKSON, on June 11, 1887, ordered, adjndged and decreed that the said orders of April 10, 1884, should be set a side and held for naught, and that the said orders of December 22, 1883, should be restored.

From these orders of June, 1887, the Central Trust Company prayed an appeal, and the same was allowed upon giving a bond of $500. But no appeal from such orders of June 11, 1887, has been perfected, although more than two years have now elapsed.

It is plain, therefore, that the decrees of December 22, 1883, are, as they always have been since their entry, in full force and effect, as to each and every part thereof, and that they are now subject to no attack whatsoever from any person or in whatever manner attempted. If any irregularity, or any error ever lay in the said decrees, it is now cured. The decrees, and every part theroof, are now absolutely unimpeachable. Some complaint was made below that one of the entries as to the Southeastern Division was made in the

wrong suit; but this was corrected by the orders made in June, 1887. These orders were made upon petitions filed by each appellee in both the causes, issues upon which were made by pleadings on the part of the appellants. Upon the issues thus presented, the Court first made the orders of June, 1887, and, subsequently, the orders of January, 1889, properly distributing the payments to be made to the appellees, respectively, from the several divisions. As has been remarked, any prior irregularity, if such there were in the decrees of December, 1883, cannot be, the subject of complaint, such decrees being now incontestable in any forum. Even, if this were not so, the irregularity was so cured by the subsequent action as now not to be the subject of any complaint. Moreover, the liens on each division of the railroad arose when the Receiver, with the authority of the Court, purchased the locomotives for the use of the respective divisions. These liens arose and were distributed by the mere force of the contract of purchase and of the Receiver's debts thereby contracted.

The orders entered on January 28, 1889, and now appealed from, were orders or decrees properly made to carry into effect according to their terms and according to the terms of the decrees of sale in the foreclosure suits respectively, the decrees of December 22, 1883. The appellants not having appealed from the orders of December, 1883, and of June, 1887, should not be heard by way of appeal from orders necessarily made to carry into effect these unimpeached orders of the Court adjudicating the appellee's rights.

But there exists no error in the decrees of January, 1889. The application of the trust company then to docket a bill of review as of March, 1884, if entertainable at all, was addressed to the discretion of the Court, and its refusal cannot be reviewed here. The application of the Dayton, Fort Wayne and Chicago Railroad Company to intervene in the cause, was also addressed to the discretion of the Court; and its decision can not now be reviewed. The amounts fixed as the amounts of the respective liens of the appellees were not disputed, no one claiming that any other greater credits should be given upon the amounts fixed by the decrees of December, 1883, than were there allowed by the appellees themselves (Rec. 1277-78, pp. 86 and 90; Rec. 1279-80, pp. 83 and 87).

What the appellants are endeavoring to have reviewed is the action of the Court taken in December, 1883. This action cannot

be reviewed upon these appeals. In fact the contract thereby made, cannot be impeached by the appellant, or now in any way impaired.

The so-called bills of exceptions of the Central Trust Company are meaningless and not appropriate to an appeal in equity. The questions sought to be brought up thereby, are before this Court in a more orderly form upon the bills of the Trust Company in Causes 1281 and 1282, motions to dismiss, which are submitted together with this motion.

As to Damages.

The appeals being without merit, and having evidently been taken for delay merely, ten per cent. damages should be added upon the amount of the decrees in addition to interest under Rule 21.

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